IN THE

Supreme Court of the United States

October Term, 1976

No. 76-365

SAMUEL H. SLOAN,
SAMUEL H. SLOAN & CO.,

Petitioners,

-against-

SECURITIES & EXCHANGE COMMISSION, CANADIAN JAVELIN LTD., JOHN C. DOYLE, WILLIAM H. WISMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the following decisions of the United States Court of Appeals for the Second Circuit: a decision and order dated January 7, 1976 dismissing the appeal of *S.E.C. v. Samuel H. Sloan & Co.*, Docket No. 74-1436. A copy of this decision and order is included as Appendix A to this petition. A decision and order dated January 7, 1976 dismissing the appeal of *S.E.C. v. Canadian Javelin Ltd. et al.*, Docket No. 75-7046. A copy of this decision and order is included as Appendix B to this petition. A decision and order dated January 7, 1976 dismissing the appeal of *S.E.C. v. Samuel H. Sloan*, Docket No. 75-7056. A copy of this decision and order is included as Appendix C to this petition. A decision and order dated March 15, 1976 denying a motion to reinstate the above three appeals. A

copy of this decision and order is included as Appendix D to this petition. A decision dated April 13, 1976 denying three petitions for a rehearing and suggestions that the rehearing be en banc. A copy of this decision is included as Appendix E to this petition.

None of these decisions have been, and apparently none of them will be, officially reported. However, the initial dismissal of these three appeals was cited in *Sloan v. S.E.C.*, 535 F.2d 676, 677-678 (2d Cir. 1976), *cert. pending* Docket No. 75-58 and again in *S.E.C. v. Sloan,* 535 F. 2d 679, 680 (2d Cir. 1976).

A single petition for a writ of certiorari covering all of these cases is hereby filed as permitted by Rule 23(5) of the Supreme Court Rules.

OPINIONS BELOW

No formal opinions were rendered by the United States Court of Appeals for the Second Circuit in conjunction with any of the decisions and orders of which review is hereby sought. However, a number of opinions were rendered by the United States District Court for the Southern District of New York in these cases. In the first case, on August 16, 1973, in a decision reported as *S.E.C. v. Samuel H. Sloan & Co.*, 369 F. Supp. 994 (S.D.N.Y. 1973), the District Court Ward, Judge, denied a motion for an order compelling discovery. A copy of this decision is included as Appendix F to this petition. On November 20, 1973, in an unreported decision in the same case, the District Court denied a motion to dismiss the complaint and for various other relief. A copy of this decision is included as Appendix G to this petition. On January 7, 1974, in a decision reported as *S.E.C. v. Samuel H. Sloan,* 369 F. Supp. 996 (S.D.N.Y. 1974) the District Court, after a trial, granted the request of the Securities & Exchange Commission ("S.E.C.") for a judgment of permanent injunction. A

copy of this decision is included as Appendix H to this petition. Following this decision, a judgment was entered in favor of the S.E.C. A copy of this judgment is included as Appendix I to this petition. The petitioners thereafter filed a motion for a new trial and for relief from judgment on the grounds of newly discovered evidence and on the grounds of fraud, misconduct and other misrepresentation of an adverse party. These motions were denied summarily and without opinion. The petitioner filed two notices of appeal: one appealing from the judgment which is included as Appendix I to this petition and the other appealing from the denial of the various post-trial motions. These appeals were consolidated under Docket No. 74-1436.

In the second case, on October 29, 1974, in a decision reported as *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648 (S.D.N.Y. 1974) the District Court, MacMahon, Judge, denied a motion by the petitioner to intervene and to vacate two judgments of permanent injunction which had been entered by consent. A copy of this decision is included as Appendix J to this petition. Copies of the judgments and the signed consents authorizing their entry are included as Appendix K, Appendix L, Appendix M and Appendix N to this petition. Petitioner Samuel H. Sloan appealed from this decision and the appeal was assigned Docket No. 75-7046.

In the third case, *S.E.C. v. Sloan,* 74 Civil 5729, the S.E.C. commenced the action on December 30, 1974 and on the same day obtained a temporary restraining order from Judge Ward. On January 8, 1975, this temporary restraining order was extended for ten days by Judge Griesa. On January 17, 1975, following an oral presentation by attorneys for the S.E.C., Judge Ward refused to recuse himself and orally denied various motions by the defendant. The full text of the presentation of the S.E.C. and of Judge Ward's oral decision is included as Appendix O to this petition. Thereafter Judge Ward granted orally

the motion of the S.E.C. for an injunction. The text of this oral decision is included as Appendix P to this petition. Judge Ward thereupon signed an order of injunction a copy of which is included as Appendix Q to this petition. The petitioners appealed from that decision and this appeal was assigned Docket No. 75-7056.

JURISDICTION

The three appeals which are the subject of this petition were summarily dismissed on January 7, 1976. On February 6, 1976, the petitioners filed a motion to reinstate all three appeals. This motion was denied on March 15, 1976. The petitioners also filed separate petitions for a rehearing and suggestions that the rehearing be en banc with respect to each of the three appeals. These petitions and suggestions were summarily denied on April 13, 1976. On June 18, 1976 petitioners filed in this Court a motion to extend the time to file a petition for a writ of certiorari. On June 23, 1976, in *Sloan v. S.E.C.*, No. A-1129, Mr. Justice Marshall extended until September 10, 1976 the time within which to file a petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit err in summarily and *sua sponte* dismissing the three appeals without giving a statement of reasons for the dismissals?

2. Did the United States Court of Appeals err in refusing to reinstate all three appeals on motion of the petitioners particularly inasmuch as no opposition was filed by the Securities & Exchange Commission?

3. Did a three judge panel of the United States Court of Appeals deprive the petitioners of their due process rights

in these cases by failing to follow the established procedures of the Second Circuit which provide that in a case where a petition for a rehearing is filed which contains a suggestion that the rehearing be en banc, a copy of the petition is distributed to every judge of the court in regular active service and each judge is given the opportunity to request that all of the active judges be polled?

4. Were the 31 findings of fact filed by the District Court in the decision reported as *S.E.C. v. Samuel H. Sloan,* 369 F. Supp. 996 (S.D.N.Y., 1974) clearly erroneous in that none of these findings of fact were supported by properly admitted evidence in the record and does therefore Fed. R. Civ. P. 52(a) require that these findings be set aside?

5. Were the hand written trial balances, net capital computations and related schedules which were prepared by members of the S.E.C. staff properly received into evidence where many admittedly contained errors and did not reflect the truth, where all of them were based at least in part on hearsay, conjective and speculation and where in no case did the S.E.C. introduce into evidence the underlying records upon which the S.E.C. staff members supposedly based their calculations nor did the S.E.C. offer into evidence the pink sheets or other documents upon which the S.E.C. staff members claimed to have based their security pricings?

6. Did the District Court err in its pre-trial conduct (1) by refusing to dismiss the action for failure to prosecute even though the S.E.C. delayed for two and one-half years before bringing its case to trial, (2) by refusing to dismiss the complaint for failure to state a claim, (3) by refusing to dismiss the action when the S.E.C. elected to proceed in the administrative forum, (4) by refusing to permit the timely discovery of documents necessary to the defense and (5) by refusing to entertain claims that the S.E.C. attorneys had committed acts of misconduct and had abused the

judicial process in the commencement and prosecution of this action?

7. Did the District Court err in its conduct during the trial (1) by failing to give the petitioner a fair and impartial hearing, (2) by interfering with the orderly presentation of the petitioners case, (3) by badgering and harassing the petitioner with menacing remarks, (4) by refusing to permit the petitioner to call as his witnesses various employees of the S.E.C., (5) by refusing to hear evidence that the S.E.C. attorneys had perpetrated frauds upon the court in the prosecution of their case, (6) by refusing to require the S.E.C. attorneys to produce exculpatory and other Jencks Act material, (7) by refusing to permit a continuation of the trial in order to enable the petitioner to obtain the testimony of the accountant who had been selected by the S.E.C. to audit the financial records of the petitioners, (8) by displaying prosecutorial zeal by frequently interrupting the examination of the petitioner which was being conducted by the S.E.C. attorney in order to conduct his own lengthy examination and (9) by displaying bias and prejudice in other ways?

8. In an action where, as here, no showing was made that the petitioners had used the means or instrumentalities of interstate commerce or that they had purchased or sold any security and no showing was made of the inadequacy of legal remedies, the likelihood of future violations or that an injunction was necessary because irreparable harm would otherwise result, should the request for a judgment of permanent injunction have been denied?

9. Is the judgment of permanent injunction fatally defective in that it fails to comply with Fed. R. Civ. P. 52(a) and Fed. R. Civ. P. 65(d) and must therefore the judgment of permanent injunction be vacated?

10. Did the District Court err in denying, summarily and

without a hearing, the petitioner's motion under Feb. R. Civ. P. 60(b)(3) to vacate the judgment on the grounds of fraud, misconduct and other misrepresentation by the S.E.C. attorneys in charge of the prosecution of this case?

11. In *S.E.C. v. Canadian Javelin Ltd.*, did the District Court err in refusing to permit the petitioner to intervene and in refusing to vacate judgment of injunction obtained by consent?

12. Does Article III of the United States Constitution prohibit a district judge from entering by consent the judgments entered in this case?

13. Must the injunctions be vacated because the district court failed to comply with Fed. R. Civ. P. 52(a), because the injunctions fail to satisfy the requirements of Fed. R. Civ. P. 65(d), because the injunctions were not based upon a valid and binding consent by all parties foreclosing further litigation and because a district court lacks the authority to enjoin acts which are not illegal?

14. In *S.E.C. v. Sloan*, 74 Civil 5729, did the district court err in entering an injunction without conducting a proper evidentiary hearing where the burden of proof was on the plaintiff; did the decision of the court fail to comply with Fed. R. Civ. P. 52(a) and did the order of injunction fail to meet the requirements of Fed. R. Civ. P. 65(d)?

15. Did the district court judge err in failing to recuse himself from proceeding further in this case inasmuch as this case was not assigned to him by lot as required by Rule 4(A) of the Calendar Rules for the Southern District of New York and inasmuch as the district court judge had become embroiled in a long standing running personal controversy with the petitioner?

16. Should this action have been dismissed because the acts alleged by the S.E.C. did not constitute violations of Rule 17a-4 or of Rule 15c2-11 and because the Fourth and Fifth Amendments to the United States Constitution

prohibit the S.E.C. from exercizing the unfettered right to rummage through the financial records of the petitioners?

17. Is the prosecution by the government of all three of the actions which are the subject of this petition barred by Article III, Section 2, paragraphs 1; Article III, Section 2, paragraph 3, and the Fifth, Sixth, Seventh, Ninth and Tenth Amendments to the United States Constitution?

18. Are S.E.C. Rules 15c2-11, 15c3-1, 17a-3 and 17a-4 unconstitutional facially and as applied in these cases and did the Securities & Exchange Commission exceed its authority in promulgating these rules?

19. Does the Constitution empower an agency of the federal government to harass a private citizen endlessly with civil and administrative litigation?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Paragraph 1, in pertinent part, states:

> The judicial power shall extend to all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made . . . ; to controversies to which the United States shall be a party . . .

Article III, Section 2, Paragraph 3, in pertinent part, states:

> The trial of all crimes . . . shall be by jury . . .

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment, in pertinent part, states:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . .

The Sixth Amendment, in pertinent part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . and to be informed of the nature and the cause of the accusation . . .

The Seventh Amendment states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

The Ninth Amendment states:

> The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Section 15(b)(5) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(b)(5), prior to June 5, 1975,[1] in pertinent part stated:

> The Commission shall, after appropriate notice and the opportunity for a hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension or revocation is in the public interest and that such broker or dealer . . . (C) is permanently or temporarily enjoined by order judgment, or decree of any court of competent jurisdiction . . . from engaging in or continuing any conduct or practice . . . in connection with the purchase or sale of any security.

Section 15(b)(7) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(b)(7), prior to June 5, 1975,[2] in pertinent part stated:

> The Commission may, after appropriate notice and the opportunity for a hearing, by order, censure any person or bar or suspend for a period not exceeding twelve months any person from being

1. With the exception of Section 15(c)(3) of the Securities Exchange Act, all of the statutory provisions involved were modified somewhat by the Securities Acts Amendments of 1975. Although the principle set forth in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) clearly applies here it does not appear that a change in the statutory provisions involved has occurred which could modify the result that an appellate court would reach. The possible exception to this is Section 17(a) of the Securities Exchange Act of 1934. It should be observed that Section 15(b)(5) has now been renumbered as Section 15(b)(4).

2. Section 15(b)(7) has since been renumbered as Section 15(b)(6).

> associated with a broker or dealer, if the Commission finds that such censure, barring or suspension is in the public interest and that such person . . . is enjoined from any action, conduct, or practice specified in clause (c) of said paragraph (5) [of Section 15(b) of the Securities Exchange Act of 1934].

Section 15(c)(2) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(2), prior to June 5, 1975 in pertinent part stated:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of any security . . . otherwise than on a national securities exchange in connection with which such broker or dealer engages in any fraudulent, deceptive or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(3), in pertinent part stated:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase and sale of, any security (other than an exempted security or commercial paper, bankers acceptances or commercial bills), in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards

with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers funds, and the carrying or use of customers deposits or credit balances. Such rules and regulations shall require the maintenance of reserves with respect to customers' deposits or credit balances, as determined by such rules and regulations.

Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78q(a), prior to June 5, 1975, stated:

> Every national securities exchange, member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, and preserve for such periods such accounts, correspondence, memoranda, papers, books and other records, and make such reports as the Commission by its rules and regulations may proscribe as necessary or appropriate in the public interest for the protection of investors. Such accounts, correspondence, memoranda, papers, books and other reports shall be subject at any time or from time to time to such reasonable, periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

On June 5, 1975, Section 17(a) was amended. The full text of the new Section 17(a)(1) can be found footnote 2 of Judge Ward's decision dated August 18, 1976. See Appendix S, *infra.*[3]

3. Judge Ward erroneously states that the section he quotes was in effect at the time the action was commenced. In actuality, he quotes from the new version of Section 17(a)(1). The difference is significant since the new section empowers the S.E.C. to make rules requiring brokers to "furnish such copies" of records and to "disseminate" reports to the S.E.C. The words "furnish such copies" and "disseminate" did not appear in the version of Section 17(a) which was in effect at the time the action was commenced. The significance of this becomes apparent from the fact the petitioner contended at the time this action was commenced that the law did not require him to grant to officers of the Securities & Exchange Commission general access to his financial records. In fact, it appears that the Securities & Exchange Commission requested that Congress amend the law and that it enact the new Section 17(b) of the Securities Exchange Act of 1934 specifically to meet the objections which the petitioner raised at the time the action was commenced.

RULES INVOLVED

S.E.C. Rule 15c2-11, 17 CFR §240.15c2-11.[4]

S.E.C. Rule 15c3-1, 17 CFR §240.15c3-1.

S.E.C. Rule 17a-3, 17 CFR §240.17a-3.

S.E.C. Rule 17a-4, 17 CFR §240.17a-4.

Fed. R. Civ. P. 52(a), in pertinent part, states:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state seperately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law

4. Because of the length of the S.E.C. rules involved, and the fact that they have been amended on many occasions, they are merely cited here in accordance with Rule 23(1)(d) of the Supreme Court Rules.

appear therein. . . .

Fed. R. Civ. P. 65(d) states:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specifiv in tecms shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Rule 4(A) of the Calendar Rules for the Southern District of New York states:

> "All civil actions and proceedings shall be assigned by lot to one judge for all purposes.

Rule 13 of the Calendar Rules for the Southern District of New York states:

> If it appears from the information and designation sheet that an action or proceeding is related to one previously commenced, or that any one or more actions filed simultaneously (a) arise from the same or substantially identical transactions, happenings, or events or (b) for any other reason would extact substantial duplication of labor if heard by different judges, the Coordinating Clerk shall make a report respecting the related cases to the judges concerned at the earliest date practicable. If the judges concerned agree that the cases are related, the newer case (high docket number) shall be assigned to the same judge to whom the older case (low docket number) was assigned. If the judges concerned differ as to whether the cases are related, the issue shall be decided by the Assignment Committee.

Rule 19 of the Calendar Rules for the Southern District of New York states:

> Once an action, civil or criminal, has been assigned to a judge, it shall not be transferred or reassigned to another judge, except in accordance with these rules.
>
> When a case is transferred, except under Rules 10, 11, 12, 15, 17 and 18, the transferor judge shall be assigned one more and the transferee judge one less case requiring, in the opinion of the Assignment Committee, a like amount of work and effort.

STATEMENT OF THE CASES

This petition for a writ of certiorari seeks review of orders which were entered in three injunction actions all of which were commenced by the S.E.C. Since the United States Court of Appeals for the Second Circuit in effect consolidated the appeals and simultaneously dismissed them, it is appropriate to file a single petition for a writ of certiorari covering all three cases. This procedure is authorized by Rule 23(5) of the Supreme Court Rules. These have been two more recent opinions in *S.E.C. v. Sloan,* 74 Civil 5729 *appeal dismissed* Docket No. 75-7056. The first is included as Appendix R to this petition and has been reported as *S.E.C. v. Sloan,* 535 F.2d 679 (2d Cir. 1976). Originally, the petitioner intended to include this decision as well in this petition for a writ of certiorari. However, on June 3, 1976 the petitioner filed in the Court of Appeals a petition for a rehearing and a suggestion that the rehearing be en banc with respect to that decision and that petition has not yet been decided. As a result it is too early to seek review of the decision on the petition for a

rehearing while it is too late to seek review of the decision itself. For this reason, a petition for a writ of certiorari to review that decision will, if necessary, have to be filed as a separate petition.

A second opinion which has been rendered in these cases is a decision of the Hon. Robert J. Ward dated August 18, 1976 which dismissed the action. A copy of that decision is included as Appendix S to this petition. Since the dismissal of the action has the effect vacating the injunction which is the subject of the appeal under Docket No. 75-7056, it might, under other circumstances, render that appeal moot. However, in this case the appeal is clearly not moot because, based upon the injunction entered in that action and upon the injunction which is the subject of the appeal under Docket No. 74-1436, the S.E.C. has issued an administrative order under Sections 15(b)(5) and 15(b)(7) of the Securities Exchange Act of 1934, 15 U.S.C. §§78o(b)(5) and 78o(b)(7), revoking the broker dealer registration of Samuel H. Sloan & Co. and barring Samuel H. Sloan for life from being associated with any broker or dealer. See *Samuel H. Sloan*, Securities Exchange Act Release No. 11376 (April 28, 1975), 6 S.E.C. Docket 772. The S.E.C. has recently stated that in a case of this sort, "]i]f the appellate court vacates either injunction, we will entertain an appropriate application to reconsider the sanctions herein." *In the Matter of C.R. Richmond & Co.*, Securities Exchange Act Release No. 12535 (June 10, 1976), 9 S.E.C. Docket 846, 847 n. 11. Moreover, the petitioner is appealing the S.E.C.'s administrative order appeal to the Court of Appeals under Docket No. 75-4087 and the argument of that appeal has been scheduled for October 13, 1976. It is obvious that if an appellate court determines that Judge Ward should not have issued the injunction he entered on January 17, 1975, an appellate court, in reviewing the S.E.C.'s administrative order, would be required either to reverse or to remand for further

proceedings. Since what is involved is a bar for life on the petitioner's re-entry into the securities business, it is obvious that collateral consequences will continue to flow from Judge Ward's decision unless it is reversed and hence under *Sibron v. New York*, 392 U.S. 40, 51-53 (1968) the question of the validity of the injunction is properly before the courts.

In the instant cases, the United States Court of Appeals for the Second Circuit *sua sponte* dismissed all three appeals. Neither the SEC nor any other party requested that this be done. Although no formal opinion was filed nor did the orders of dismissal give any reason for the action the court took, one case was cited: *United States v. Sperling*, 506 F.2d 1323, 1345 n. 33 (2d Cir. 1974). In that case, an appeal was dismissed on motion by the government in a situation involving a criminal defendant who had either escaped from custody or had jumped bail while his appeal was pending. It should be obvious that that decision is wholly inapplicable to the facts and circumstances of the cases presented here because (1) these are all civil rather than criminal cases (2) the government, in this instance the SEC, did not file a motion or in any way suggest that the appeals should be dismissed and (3) the petitioner had never escaped from custody or jumped bail nor, for that matter, had he ever been indicted or convicted of any crime in any federal court.

Moreover, the footnote in *United States v. Sperling*, *supra*, which the court cited states that the appeal would be reinstated on motion filed within 30 days if the defendant was by then back in custody. This decision was in accordance with precedents established by *Smith v. United States*, 94 U.S. 97 (1876) and *Molinaro v. New Jersey*, 396 U.S. 365 (1970) upon which the court in *United States v. Sperling*, relied. However, here the petitioner appeared in the United States Court of Appeals for the Second Circuit on February 2, 1976 and argued another appeal, *Sloan v.*

Canadian Javelin Ltd., Docket No. 75-7096 (2d Cir. February 6, 1976), *cert. pending* Docket No. 75-1901, and on February 6, 1976, which was within 30 days of the date of the earlier dismissal of the appeals, the petitioner filed a motion to reinstate all three appeals. A copy of the motion papers filed by the petitioner is included as Appendix T to this petition. The SEC did not express any opposition to the motion of the petitioner to reinstate all three appeals. Nevertheless, incredibly, the Court of Appeals denied the motion.

Finally, the petitioner filed seperate petitions for a rehearing and suggestions that the rehearing be en banc in each of the three appeals. However, the Court of Appeals refused to treat these petitions in the normal manner. Rather than circulate these petitioners to all of the active judges of the court and give them each the opportunity to request that a poll be taken, the three judge panel which dismissed the appeals filed an order which said that the "motion . . . for reconsideration of the denial of reinstatement of appeals numbered 74-1436, 75-7046 and 75-7056; rehearing with a suggestion of rehearing en banc . . . is denied." The petitioner had not, in fact, filed a motion of any sort. The three judges who comprised on the panel which originally dismissed the appeals, apparently out of a desire to make sure that the petitioner would not be given the opportunity for a hearing on his appeals, managed to convert the petitioners three petitions for a rehearing into a single motion and then summarily denied it.

In the hope that the events which have just been described took place as the result of a mistake or misunderstanding, the petitioner has made innumerable telephone calls to the office of the clerk and the pro se clerk and has written a letter to the presiding judge of the panel which acted on these appeals and a subsequent letter to the Chief Judge and to all of the active judges in the Second

Circuit. In spite of the obvious error which has occurred, none of these efforts have been to any avail.[5]

From this chronicle of events it is clear that the United States Court of Appeals for the Second Circuit, which, in "per curiam" opinions has characterized the petitioner as "no stranger to this court," *Sloan v. S.E.C.*, 527 F.2d 11 (2d Cir. 1975), "a securities broker dealer [who] has had more than his share of litigation in this court," *Sloan v. S.E.C.*, 535 F.2d 676, 677 (2d Cir. 1976), and "a frequent litigant in this court," *S.E.C. v. Sloan*, 535 F.2d 679, 680 (2d Cir., 1976), is unwilling to hear appeals by petitioner regardless of how meritorious they might be.[6]

Under these circumstances, a petition for a writ of certiorari would most appropriately be granted in these cases, in view of what the Court of Appeals has done and considering the fact that briefs have been filed by both sides in the Court of Appeals and all that remains would be for that court to resolve the legal and factual issues presented in these appeals, a logical and expenditious course of action would be for this Court to grant this petition for a writ of certiorari, to reinstate the appeals, and to remand to the Court of Appeals for a resolution of

5. As of this writing, one of Chief Judge Kaufman's law clerks, Pat Hanlon, has advised the petitioner that he agrees that the correct procedures were not followed in these cases and that he has been speaking to the appropriate persons with regard to straightening things out. Whether Mr. Hanlon will succeed in overcoming what appears to be a determined effort by somebody to keep the petitioner from having a fair hearing on his claims has yet to be seen. Although it would be appropriate to delay the filing of this petition for a writ of certiorari until such time as the petitioner becomes certain that no further action on these cases would be taken by the Court of Appeals, the last day for filing this petition for a writ of certiorari has been set as September 10, 1976 and this petition is being filed on that day.

6. This circumstance is also apparent from the arbitrary and completely irrational character of the decisions in *Sloan v. Canadian Javelin Ltd.*, Docket No. 75-7096 (2d Cir. Feb. 6, 1976) *cert. pending*, Docket No. 75-1901 and *Sloan v. S.E.C.*, 535 F. 2d 676 (2d Cir. 1976) *cert. pending* Docket No. 76-58.

the issues presented. The petitioner would, of course, be gratified if this Court would do exactly that. However, the petitioner believes that this Court could equally well follow an alternative course of action, namely, to grant this petition for a writ of certiorari and hear and decide these appeals on the merits. Although for policy reasons this Court prefers not to pass upon issues which have not been passed upon by at least two lower courts, here a situation is presented where a Court of Appeals has arbitrarily refused to pass on questions which were properly and timely presented and a lower court, by its inaction, cannot be given the power to prevent a higher Court from doing what ought to be done in a case. For this reason, there is no barrier to a decision by this Court to resolve these appeals on their merits. Moreover, many of the questions presented by these cases are of such imperative public importance that this Court could well have granted certiorari under Rule 20 of the Supreme Court Rules. In 1975 and thus far in 1976 the news media has been deluged with stories which are outgrowths of injunction actions filed by the S.E.C.

Gulf Oil Corp., Lockheed Aircraft and many other major corporations have been the targets of S.E.C. actions. Whether such suits are legally maintainable and whether the consent decrees which are almost invariably entered in these cases are valid and binding are two of the issues which are squareiy presented in the cases which are included in this petition. In fact, a recent article in "Barron's" dated August 16, 1976, p. 3, entitled "John Doyle—Evil Genius"[7] sets forth at length the events which occurred in the aftermath of the entry of the "consent" injunctions which are included as Appendix L and Appendix N to this petition.[8]

7. John Doyle is a respondent to this petition since he is a defendant in *S.E.C. v. Canadian Javelin Ltd.*, even though he did not file an answering brief in the Court of Appeals.

8. While describing the plethora of litigation, most of which has been filed in the Canadian courts, which has grown around these two consent injunctions, Barron's failed to mention that the appeal in the instant case is still before the courts.

In addition, it should be mentioned that the United States Court of Appeals for the Second Circuit has become arrogant to the point where it has stated in effect that it knows when this Court should grant certiorari and, in so doing, it has implied that its time may be more valuable than the time of the United States Supreme Court. See *Green v. Santa Fe*, — F.2d — (2d Cir. 1976) where the Second Circuit denied a petition for a rehearing and a suggestion that the rehearing be en banc and stated that it was doing so because it was certain that the Supreme Court would grant certiorari in that case.

For this reason, since the petitioner believes that this Court can and perhaps should decide the merits of these appeals, this statement of the cases will deal with not only the facts involved in the summary dismissal of the appeals but will state, albeit briefly, the facts concerning the commencement and prosecution of these actions.

The case entitled *S.E.C. v. Samuel H. Sloan & Co., Samuel H. Sloan*, 71 Civil 2695 was commenced when the S.E.C. filed its complaint on June 17, 1971. The complaint alleged in conclusory fashion that the defendants had violated 15b1-2, 15c3-1, 17a-3 and 17a-4, 17 CFR §§240.15b1-2, 240.15c3-1, 240.17a-3, 240.17a-4.[9] The complaint demanded an injunction as well as the appointment of a receiver and a freeze on the defendants' assets.

On June 18, 1971 the S.E.C. filed a motion for a temporary restraining order and a freeze on the assets of Samuel H. Sloan ("Sloan") and Samuel H. Sloan & Co. ("Sloan & Co.") and an affidavit and memorandum of law in support thereof. Among the charges made in this memorandum of law was that the defendants had

9. After filing the complaint, the SEC never mentioned Rule 15b1-2 and apparently the allegation that the defendants violated this rule was either forgotten or abandoned.

misappropriated a large sum of money, perhaps as much as $156,000 from one Joseph F. Iny.

The motion papers which the SEC filed were not served on either Sloan or Sloan & Co. However, William Nortman, a Branch Chief at the New York Regional Office of the SEC and the attorney in charge of the prosecution of the case, called to advise Sloan that an appointment had been made in the chambers of Judge McLean for the morning of June 21, 1971. Sloan appeared at this meeting with his attorney, Roy L. Weiss.

After a heated discussion in which George Brandt, a second attorney for the SEC and a subordinate of Mr. Nortman, stated that Sloan had never provided the S.E.C. with an April, 1971 trial balance and Sloan stated to the contrary that he had supplied such a document, Judge McLean signed the order which the S.E.C. attorneys requested. However, Judge McLean wrote into the order the words "except completing transactions heretofore committed" which modified the temporary restraining order so as to prohibit Sloan from making new purchases and sales of securities while allowing him to receive and deliver securities and pay checks so as to fullfil his existing contractual commitments. The S.E.C. attorneys stated to Judge McLean in chambers that this arrangement was satisfactory to them.

Apparently, very shortly after they left Judge McLean's chambers with the temporary restraining order which they had obtained, the S.E.C. attorneys decided that they wanted a complete freeze on Sloan's assets after all. The temporary restraining order was served on the Chemical Bank where the defendants maintained their account and Nortman called Jim Wolf, Sloan's account officer, and obtained from him an agreement to dishonor all checks written by Sloan. The result of this was that the $37,999.03 which Sloan had in his bank account became frozen as if by

an order of attachment and since Sloan was not immediately informed that this had taken place, he continued to make deposits into his account at Chemical Bank. The result was that approximately 40 checks totalling approximately $80,000. which Sloan had written to various brokers and dealers, bounced.[10]

On June 23, 1971, with a large crowd of brokers and dealers waiting for their money, Sloan appeared in Judge McLean's court at the time set for the hearing on the SEC's motion for a preliminary injunction. The S.E.C. attorney, Mr. Nortman, Sloan's attorney, Mr. Weiss, and Judge McLean immediately commenced a three-way discussion about settling the case with a consent to a permanent injunction in spite of the fact that Sloan repeatedly stated that he would consent to nothing of the kind. (Tr. of colloquy of June 23, 1971 pp. 3, 5, 9 and 12). Nortman stated that if Sloan would consent to an injunction and if Sloan would agree to hire one Mr. Robert W. Taylor, who was a personal friend of Joseph W. Barton, the S.E.C.'s chief of Broker Dealer Inspection, and an accountant who was acceptable to the S.E.C., to prepare an audit of the books of Sloan & Co., Tr. 18, the S.E.C. would be willing to abandon its request for a receiver and the freeze on Sloan's bank account would be lifted and Sloan would be able to meet his contractual obligations and resume the normal operations of a broker dealer. Nevertheless, Sloan

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10. At the trial of this action, an officer of Chemical Bank who was subpoenaed by Sloan appeared with the relevant records from the bank and testified that the freeze on Sloan's bank account actually commenced on June 18, 1971. Since this was the date that the S.E.C.'s motion for a temporary restraining order was filed, this fact supports a conclusion that Nortman was sufficiently conficent that Judge McLean would grant the request for a temporary restraining order that he called Mr. Wolf and asked that Sloan's bank account be frozen in advance. However, at trial Nortman testified that he had done nothing of the kind, Tr. 696, and in colloquy twice suggested that the bank was fouled up. Tr. 691, Tr. 692. Wolf was living in Florida by the time of the trial and was beyond the reach of a subpoena.

still would not consent to an injunction until Judge McLean stated (Tr. 17):

> "As I understand it, if the defendant maintains that his records are in accordance with the statute and the net capital rule is in accordance with the statute . . . if he says that is a fact, I don't quite see why he should be reluctant to accept an injunction on that basis; however, that's up to him."

Immediately following these words, Sloan changed his mind and stated that he would consent to a preliminary injunction. He made it clear that he wanted a preliminary injunction as opposed to a permanent injunction so that the litigation would remain open and he could still ultimately be vindicated in court. This turned out to be a regretable decision. The price Sloan has paid for insisting on a preliminary injunction rather than a permanent injunction has been that for the past five years he has been harassed endlessly with civil and administrative proceedings instituted by the S.E.C.[11]

For more than two years after the entry of the preliminary injunction by consent, there were no docket entries or court filings in this case. In the meantime, the SEC attorneys repeatedly sought a consent from Sloan to make the preliminary injunction permanent. When Sloan refused to consent, the SEC threatened to commence an administrative proceeding if Sloan persisted. Sloan persisted and on April 25, 1972 the administrative proceeding was in fact commenced.[12] The SEC then made numerous

11. In its brief to the Court of Appeals in the appeal of this action, on page 2, the SEC stated:

> "This action is the seminal case in a web of litigation involving Mr. Sloan and the Securities & Exchange Commission. Despite the array of proceedings spawned by this initial enforcement action taken by the Commission against Mr. Sloan the substance of the case at bar could not be more routine.

12. The order for public proceedings alleged the existence of the preliminary injunction as well as violations of six S.E.C. rules. The S.E.C. has emphasized that the entry of an injunction, even by consent, and without more, has been held by the S.E.C. to provide a sufficient basis for the imposition of sanctions.

offers of settlement. However, all of the offers of settlement were predicated on the prior condition that Sloan "consent" to a permanent injunction. Consequently, the offers were refused.

An administrative hearing was held and, on April 25, 1973, an administrative law judge rendered a decision which supported the position of the SEC. The SEC then advised the District Court that its strategy was to ask the Court to make the preliminary injunction permanent based upon the transcript of the administrative hearing and thereby to avoid a judicial trial. See Affidavit of Alan M. Rashes, SEC attorney, in opposition to a motion for discovery, of the administrative proceeding transcript ¶2. However, at a pre-trial conference Judge Ward, who, following the death of Judge McLean, had been assigned to this case, apparently advised the SEC attorney that he would not be inclined to grant summary judgment without a hearing. Instead, he set a December 10, 1973 trial date and directed the parties to file proposed findings of fact and conclusions of law prior to the trial. After denying a motion filed by Sloan, pro se, see Appendix G, a five day trial was had which resulted in the decision included as Appendix H to this petition. Sloan filed various post trial motions and then appealed.

The case entitled *S.E.C. v. Canadian Javelin Ltd., John C. Doyle and William M. Wismer,* 73 Civil 5074 was commenced on November 29, 1973 and trading in Canadian Javelin Ltd. was suspended by the SEC on that date. The defendants appeared, filed answers and served interrogatories. However, on July 17, 1974, just prior to a scheduled trial date, two of the defendants agreed to consent to a permanent injunction. The third defendant, William M. Wismer, Toronto attorney, filed a "stipulation" that he would obey the law in the future "subject to the contempt power of the court" and the action was dismissed as to him.

The complaint which was filed by the S.E.C. employed colorful language not commonly found in a formal court filing. For example, it alleged that Canadian Javelin Ltd. had a "proclivity for a lack of candor," see ¶23A, and that its proposed Panama copper mining project had been described as one of the worlds largest and most profitable "all in superlative language more fit for suitable use by midway carnival hawkers than responsible officials of publically held companies." See ¶30.

The complaint also alleged that on September 25, 1958 Canadian Javelin Ltd. and John C. Doyle had consented to the entry of a permanent injunction in an action commenced by the S.E.C., ¶¶6, 7, which had been filed charging that sales of unregistered shares of Canadian Javelin Ltd. were being made in the United States through telephone calls from "boiler rooms" in Montreal. ¶6. The complaint also alleged that at a later date Doyle had jumped bail following an adverse Court of Appeals decision and that "presently he is a fugitive from justice." ¶7. Based upon these allegations and a variety of other allegations of serious criminal wrongdoing on the part of the defendants, the S.E.C. prayed for the appointment of a special receiver who would see to it that in the future Canadian Javelin Ltd. would "comply with the federal securities statutes." ¶47.

As for recent violations of the law, the principal thrust of the SEC's complaint was that the defendants had issued a series of false and misleading press releases and that "the statements made is this continuous chain of hyperbolic press releases reveal a course of business that would, did and will operate as a fraud and deceit." ¶28. Specifically, the complaint alleged that this chain of press releases had caused the price of shares of Canadian Javelin Ltd. to rise from 7-1/4 on July 6, 1973 to 13-3/8 on July 27, 1973. ¶¶ 11, 12.

It so happened that Sloan had been a short seller of 33,500 shares of Canadian Javelin Ltd. during this precise

time period and had suffered enormous losses as a result. Indeed, he had commenced his own prior lawsuit against Canadian Javelin Ltd., referred to *supra.* In that case, the district court, Bonsal, Judge, had dismissed Sloan's suit on procedural grounds but had stated in his decision that had he not done so he would have stayed the action pending the outcome of the S.E.C.'s suit. Moreover, Judge Bonsal dismissed the action without prejudice as to defendants Canadian Javelin Ltd., Doyle and Wismer and this left Sloan free to sue those defendants. As a result, Sloan filed an appropriate motion to intervene which included a proposed complaint and requested that the court vacate the consent injunctions. This motion was denied in a decision included as Appendix J to this petition. Sloan appealed.[13]

The third case, entitled *S.E.C. v. Samuel H. Sloan individually and d/b/a Samuel H. Sloan & Co.,* 74 Civil 5729 was commenced on December 30, 1974. Unlike the other cases, some of the facts involved in this suit are not in dispute. On November 6, 1974, Sloan wrote a letter to the S.E.C. to advise that he would no longer make his books and records available for routine broker dealer inspections and that he would not show his books and records to any member of the S.E.C. staff who could not produce a valid search warrant. Sloan stated that he was asserting this position in accordance with the rights guaranteed to him by the Fourth Amendment.

The S.E.C. replied in a letter from Nortman dated December 19, 1974 which stated that rules provided that examiners and other representatives of the SEC were entitled to access to the books and records of a broker dealer "at any time or from time to time" and that staff

13. Judge MacMahon's decision stated that he was denying Sloan's request for leave to appeal. However, it has been established that Sloan can take an appeal from this decision as a matter of right. *Ionian Shipping Co. v. British Laws Insurance,* 426 F.2d 186 (2d Cir. 1970). The SEC has never questioned the appealability of Judge MacMahon's decision.

investigators would be visiting Sloan on December 26, 1974 and Sloan would then be expected to make his financial records available "immediately on request."

On December 26, 1974 two members of the S.E.C. staff appeared at Sloan's apartment and asked to see Sloan's books and records. Sloan inquired as to whether they had brought with them a valid search warrant. The reply was negative but Sloan was handed a copy of Rule 17a-4, Sloan stated to the S.E.C. investigators that Rule 17a-4 did not require him to make his books and records available to the S.E.C. and that accordingly he was denying the S.E.C. investigators access to his financial records. At that point, the two S.E.C. staff members left.

Four days later, the S.E.C. instituted suit. Alleging that Sloan had violated Section 17(a) of the Securities Exchange Act and S.E.C. Rule 17a-4 promulgated thereunder because the S.E.C. did not have immediate access to Sloan's financial records, the S.E.C. demanded a "mandatory order . . . to permit immediate examination in an easily accessible place . . . as required Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder."

There was also a second main branch to the S.E.C.'s complaint regarding allegations of violations Rule 15c2-11. The apparent purpose of this rule is to give the S.E.C. the effective power to prohibit trading in a security unless the issuer of that security is currently filing reports with the SEC. The rule, however, does not accomplish this purpose directly. Rather it prohibits brokers and dealers from entering quotations in the pink sheets unless certain conditions are met. If, for some reason, these conditions cannot be met, as is often the case when the issuer of the security is not currently filing reports with the S.E.C., the effect of Rule 15c2-11 is to bring about a de facto suspension of trading in a security without a formal order

of suspension ever being published. The S.E.C. has devised an ingenious procedure which enables it to control which securities are permitted listings in the pink sheets while at the same time never directly passing on the question of whether a particular quotation is legal.

This procedure is that when a broker wishes to list a bid or an asked quotation in the pink sheets, he is forced to file what is known as Form 211 with the National Quotation Bureau, Inc. Form 211 is not an official United States government form; rather it is, in effect, a quotation application which was devised by the National Quotation Bureau, Inc. after a bit of arm twisting by the S.E.C. When a broker submits a completed Form 211 to the National Quotation Bureau, Inc. it is forwarded directly to Ira Spindler, ("Spindler") an employee of the S.E.C. Spindler examines the form and undertakes whatever further investigation he deems to be appropriate and then either does nothing in which case the quotation application is automatically accepted after the passage of three days or, if he determines that the resumption of quotations in this particular security is contrary to the desires of the SEC, he makes a telephone call to broker dealer and "suggests" that the quotation application be withdrawn. It appears that prior to December, 1974, Spindler's "suggestion" that the quotation application be withdrawn was in all cases adopted. No broker or dealer was willing to take the chance that the official wrath of the SEC would be incurred by the failure to withdraw a quotation application. For this reason, there had never been a contested case involving an alleged Rule 15c2-11 violation.

This state of affairs came to an end on December 18, 1974 when Spindler called Sloan and suggested that he "withdraw" two Forms 211 which Sloan had recently submitted and Sloan committed the unthinkable act of failing to indicate that he would do so. The reaction of the

SEC was to file suit against Sloan and the result was the second branch of the SEC's complaint.

In filing its complaint, the S.E.C. apparently decided not to follow the normal procedure which is to take the complaint to the Cashiers Office at Room 604 of the U.S. Courthouse where a wheel is spun and lot is drawn so as to bring about the assignment of the case by lot to one judge for all purposes. It seems that the SEC attorneys handling this case did not want to take their chances on the luck of the draw and instead proceeded directly to the chambers of Judge Ward as well as to the office of the Coordinating Clerk and prevailed upon them to assign this case to Judge Ward without the drawing of lots. The S.E.C. attorneys had good reason to want to do so in view of the highly favorable decision Judge Ward had given them approximately one year earlier. Moreover, had this not been done the action almost certainly would have eventually been assigned to Judge Griesa since Sloan's lawsuit against the S.E.C., in which Sloan had sued for, *inter alia*, a declaration of the unconstitutionality of Rule 15c2-11, was still *pending*.[14] For strategic reasons, the S.E.C. did not want both cases to be assigned to the same judge. The S.E.C. had already requested and obtained from Judge Griesa several extentions of time to answer and was about to ask Judge Griesa for an additional month to file certain motion papers. At the same time, in the action it was commencing against Sloan, the S.E.C. wanted an immediate hearing on its application for a temporary restraining order and a preliminary injunction. Clearly, if both cases had been assigned to the same judge, the S.E.C. would not have gotten far in its strategy of expediting one

14. A petition for a writ of certiorari in the case which was then pending before Judge Griesa is now pending before this Court under Docket No. 76-58.

case while delaying the resolution of the other.[15] Moreover, at this time SEC Commissioner A.A. Sommer Jr. had recently made a speech attacking Judge Griesa for sentencing a former officer of Four Seasons Nursing Centers of America, Inc. to only one year in jail.[16] For this reason, it was understandable that the SEC did not want to have a new case assigned to Judge Griesa.

When the S.E.C. filed its complaint, Judge Ward immediately scheduled a conference in chambers to consider the S.E.C.'s application for a temporary restraining order. Sloan appeared and requested that Judge Ward recuse himself on the grounds of bias and prejudice and on the grounds that the case had not been properly assigned to him. Judge Ward agreed to do so but stated that he would sign the SEC's requested temporary restraining order because no other judge was available to act due to the lateness of the hour. The life of the temporary restraining order was to extend until January 8, 1975.

By that date, however, Judge Ward had changed his mind about recusing himself and had gone away on vacation. As a result, Judge Griesa, who happened to be the Part I judge on that date, acting on the request of Judge Ward, extended the temporary restraining order without notice to Sloan for another ten days until January 17, 1975. When that date came, Judge Ward held what he had said would be an evidentiary hearing on the SEC's motion for a preliminary injunction. It turned out, however, that the

15. This strategy was additionally furthered by the device of assigning the action brought by the SEC against Sloan to attorneys employed in the New York Regional Office of the SEC while assigning Sloan's case against the SEC to an attorney who was in the Washington, D.C. office of the S.E.C.; an attorney who, incidently, was not a member of the bar of the Southern District of New York.

16. For a decision in that case see *United States v. Clark*, 359 F. Supp. 131 (S.D.N.Y. 1973).

normal type of hearing was not conducted and the SEC was not required to and did not call any witnesses in its behalf. As a result, the only evidence which Judge Ward had before him were three affidavits prepared by members of the S.E.C.'s staff which calimed to set forth facts based "upon information contained in the official files of the Commission and upon information and belief." Nevertheless, Judge Ward indicated that this evidence, which was really no evidence at all, was sufficient to entitle the SEC to an injunction unless Sloan, by calling his own witnesses, was able to disprove what was stated in the affidavits. However, when Sloan tried to call Selvers, who had signed one of the affidavits, as his witness, the S.E.C. protested vigorously and Judge Ward stated that he was going to disregard Selvers' affidavit and was not going to permit Sloan to call Selvers to testify. Sloan also called Spindler as his witness, but when Spindler testified he professed the almost total inability to recall the events of less than one month earlier which he had related in his affidavit. Nevertheless, on this flimsy showing Judge Ward granted an injunction and indeed signed it in such great haste that what he signed in fact was not a preliminary injunction but was what the SEC calls a permanent injunction. It was entered as a judgment by the clerk. From this injunction, Sloan appealed.

REASONS FOR GRANTING THE WRIT

Rule 19(1)(b) of Supreme Court Rules, states that a petition for a writ of certiorari may be granted "Where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." This is precisely what happened here, where a Court of Appeals has summarily and *sua sponte* dismissed three appeals for no apparent reason whatever. Noone is questioning the fact that the petitioners had a right to appeal and yet the single

case cited by the Court of Appeals as the basis for the dismissal is wholly inapplicable for any one of a number of obvious reasons. Under these circumstances, it would be a miscarriage of justice for this petition for a writ of certiorari not to be granted.

Concerning the merits of the underlying appeals, it can be seen that many of the questions presented are of such importance and are so likely to affect the outcome of many other cases, that they ought to be settled by this Court. For example, in its answering memorandum filed in the district court in *S.E.C. v. Canadian Javelin Ltd.*, Docket No. 75-7046, the S.E.C. stated:

> "It is well recognized that a large number of Commission cases are settled by consent decrees. This practice allows the Commission to bring far more enforcement actions than it could otherwise do. The allowance of intervention as of right would not only increase the number of enforcement actions resulting in trials and greatly increase the complexity and nature of these trials, but it would cut down the number of actions the Commission staff would bring."

In the Court of Appeals, the S.E.C. argued that if Sloan were allowed to prevail, "the Commission's enforcement program would necessarily be severely curtailed." This argument demonstrates that the questions which the petitioner is raising are important.

For example, the petitioners contend that none of the four injunctions which are involved in these cases comply with Fed. R. Civ. P. 65(d) since they all incorporate by reference various S.E.C. rules. If this Court agrees that the petitioners' argument is correct, than virtually every injunction obtained by the S.E.C. would be held to be jurisdictionally invalid. Similarly, petitioners contend that the prosecution of these S.E.C. injunction actions are

barred by Article III of the Constitution since no case or controversy is presented. If the petitioners are correct, this argument is one of monumental importance. For this reason, this petition for a writ of certiorari should be granted in order to bring about the settlement of these questions.

ARGUMENT

The argument in this case will be presented in summary form because by now it should be apparent what the arguments are. To begin with, since the order appealed from should normally be the first thing a court looks at when deciding an appeal, it should be pointed out that none of the four injunctions, which are included as Appendix I, Appendix K, Appendix M and Appendix Q to this petition, comply with Rule 65(d) Fed. R. Civ. P. since they do not "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

Each of the four injunctions incorporates by reference various S.E.C. rules and for that reason it is necessary to look up the current version of the rule in the Code of Federal Regulations or wherever it can be found to learn specifically what acts are restrained by the order. Even that is not enough because one of the contentions of the petitioners is that the S.E.C. rules in question are unconstitutionally vague. cf. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Under these circumstances, it is singularly inappropriate to incorporate by reference a rule when the party being enjoined states that he does not understand what the rule means. In one of the cases presented here, for example, the petitioner stated that he was of the opinion that S.E.C. Rule 17a-4 contained no provision which required him to show his books and records to the S.E.C. The S.E.C. disagreed stating

that Rule 17a-4 contained an implied inspection requirement. The district court did not resolve this disagreement. Instead, it signed an order directing the petitioner to comply with Rule 17a-4. This, of course, resolved nothing and unsuprisingly contempt proceedings followed.

The same argument applies with regard to the district court's non-compliance with Rule 52(a). In only one of the three actions which are the subject of this petition did the district court make a meaningful attempt to comply with Rule 52(a). In *S.E.C. v. Canadian Javelin Ltd.*, the injunctions stated that Rule 52(a) was waived. However, it has been held that an agreement between the parties that the district court need not enter findings of fact is not effective as the requirement of Rule 52(a) is mandatory. *Berguido v. Eastern Air Lines, Inc.*, 369 F.2d 874 (3d Cir. 1966) *cert. denied*, 390 U.S. 996 (1966). Moreover, it is the duty of a court of equity to protect all, including the public, whose interests may be affected by the injunction. *Inland Steel Co. v. United States*, 306 U.S. 153 (1939). In addition, without specific facts, a court cannot draft an injunction to comply with Rule 65(d). *Hodge v. Field*, 320 F. Supp. 775 (1968) *aff'd* 435 F.2d 1039 (9th Cir. 1968). See also *United States v. Ward Baking Co.*, 376 U.S. 327, 331 (1964); *Associated Press v. United States*, 326 U.S. 1, 22 (1946). The governing principles are set forth in such decisions as *International Longshoremen's Assoc. v. Marine Trade Assoc.*, 389 U.S. 64, 76 (1967); *Schmidt v. Lessaro*, 414 U.S. 473, 476 (1974). These decisions make it clear that the injunctions which have been entered here must be vacated.

On a more fundamental ground the injunctions entered in *S.E.C. v. Canadian Javelin Ltd.*, must be vacated because Article III of the United States Constitution bars their entry. See *Vermont v. New York*, 417 U.S. 270, 277 (1974). These cases are similar to that of *Gilligan v.*

Morgan, 413 U.S. 1, S (1973) where the court was faced with "a broad call on judicial power to assume continuing regulation over the activities of the defendants. The injunctions entered in *S.E.C. v. Canadian Javelin Ltd.*, for example, entered by consent, give the S.E.C. the effective power to veto the election of a board of directors. Under the principles explained in *United Transportation Workers v. State Bar of Michigan*, 401 U.S. 576, 584 (1971) a court may only enjoin conduct which is illegal and, for example, the election of a particular slate to the board of directors of Canadian Javelin Ltd., regardless of how strongly the SEC might disapprove of the persons on that slate, could not even arguably be illegal.

Moving on, this court has now reaffirmed the principle that a plaintiff must show irreparable harm and the inadequacy of legal remedies in order to prevail even in an action to enjoin violations of the Securities Exchange Act. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975). Indeed, the S.E.C. did not even try to show that the petitioner purchased or sold a security, cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), or that he used the means or instrumentalities of interstate commerce. The S.E.C. has shown neither. Moreover, federal government always has legal remedies in the form of a criminal prosecution and therefore a question exists as to whether an agency of the federal government is even entitled to an injunction. Private parties, of course, do not have a legally cognizable interest in the prosecution or non-prosecution of another, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), and hence they, and not the government, are appropriate parties to bring actions for injunctive relief.

The case which gave the S.E.C. the broad power to prosecute injunction actions was *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180 (1963). It is submitted,

however, that that decision ought to be overruled or at least modified or narrowed in its scope and application.

Turning to the specific facts of one of these cases, it can be readily observed from an examination of the record that most if not all of Judge Wards fact findings were totally unsupported by the record. On Appeal, the petitioner spent approximately half of his brief demonstrating that none of Judge Ward's 31 fact findings were supported by the record. In its answering brief, the S.E.C. essentially abandoned Judge Ward's specific fact findings but asserted that "a detailed account of each and every violation is unnecessary to sustain the judgment below." Brief p. 9. In effect, the S.E.C. was arguing that even though Judge Ward's fact findings were not supported by the record, a set of facts could be found from the record which would justify the entry of an injunction. Perhaps under these circumstances the case should be remanded for assignment to another district judge who is prepared to read the transcript and at least try to write a decision which conforms to the record. However, it is clear that Judge Ward did not do this and that the judgment which he entered cannot be allowed to stand.

On the other hand, if it is recognized that even the evidence which was admitted into the record arrived there because of faulty evidentiary rulings, it becomes clear that the action must be dismissed entirely. Most of the S.E.C.'s case was based on handwritten net capital computations prepared by members of the S.E.C.'s staff. However, this Court has held that even where documents are admitted by consent, the presentation of statistical information cannot satisfy the burden of proof. *United States v. Borden Co.*, 370 U.S. 460, 471 (1962). In a case where the accuracy of the computations is strongly contested and where the S.E.C. admits that many of them contain errors, it is obvious that the computations were not admissible. Indeed, if the holding in *S.E.C. v. Reiter*, 146 F. Supp. 552

(S.D.N.Y. 1956) is correct it is doubtful that the S.E.C. is even entitled to an injunction in a contested action of this sort.

In addition to his faulty evidentiary rulings and his erroneous factual findings, the district court judge committed acts of judicial misconduct in just about every possible way. When the petitioner was either testifying or cross examining witnesses, Judge Ward paced the floor behind the bench with his hands clasped behind his back. He frequently shouted at the pro se defendant and sometimes came down from the bench and stomped around the courtroom while the petitioner was testifying. He often bared his teeth and at one point broke a pencil in his hands.

The district court judge often interfered with the orderly presentation of the defendant's case. When Sloan commenced his direct case, the court directed him to call Joseph Iny as his first witness, tr. 535, even though Sloan had scheduled several witnesses to testify before Iny. Sloan repeatedly asked permission to interrupt his examination of Iny so that his other witnesses could testify and also meet their committments. tr. 573; tr. 590. Finally, Sloan's witnesses who were not under subpoena started to revolt. One of them left the courtroom with a promise to return and his testimony was lost altogether. When another witness, Leon, started to leave the courtroom the Court ordered him to stay. tr. 500. Another, Falk, protested but the Court would not permit him to leave either. tr. 629.

Relatively early in the trial the Court stated that it thought it knew what the issues were, tr. 386, and that the issues were primarily matters of law. tr. 442. The Court admonished the defendant not to create issues which don't exist, tr. 43, and said if he did so he would be sadly mistaken. tr. 151. It asked defendant to get on with his questioning, tr. 185, and, during the first day of trial, said

it would not sit in the courtroom day after day, tr. 186, listening to his cross examination. The Court also did not ask for recross of Kanoff. tr. 200. On one occasion involving a direct disagreement of fact involving Sloan and Beirne, the Court sided with Beirne. tr. 217. Even while the Commission was still presenting its direct case, the Court stated that the trial could not go beyond that day. tr. 365. Also when defendant claimed that the Commission had attempted to perpetrate a prior fraud upon the court, tr. 369, the Court ruled that that claim was irrelevant, tr. 370, because the burden of proof was on the government, tr. 370, and the prior fraud would not help the Commission in making its case. tr. 370. When defendant pointed out a mistake in Appoldt's trial balance, the Court told him to get on with it. tr. 459. When the Commission completed its case, the Court advised defendant that he would finish on the next day he set. tr. 519. When the trial resumed, the Court would not grant a continuation for the calling of Sloan's accountant, Robert W. Taylor. tr. 530. The Court directed defendant to call Iny as his first witness, tr. 535, and stated that it was the last day for trial. tr. 535. He stated that the testimony of Nortman would be irrelevant, tr. 687, and that the actions of the Commission were reflected solely in certain papers, books, records, and proceedings. tr. 688. Finally, the Court declared that the defendant had had more than his day in Court, tr. 708, and told him he would close his case. tr. 711. The Court would not grant a continuation to permit two witnesses who had left the courtroom that day to testify, tr. 712, and said that an intermission of a week should have been sufficient, tr. 770, especially since defendant had two months notice of the trial date. tr. 788. The court stated that if it would give very little weight to the capital computations offered into evidence by Sloan. tr. 751.

The Court gave aid and advice to the hapless S.E.C. attorney, tr. 219, while refusing to give Sloan similar aid.

tr. 177. The Court displayed prosecutional zeal and frequently interrupted the examination of Sloan by the S.E.C. attorney to conduct his own lengthy examination. tr. 220 to 222; tr. 237 to 239; tr. 247 to 250; tr. 252 t 255; tr. 257 to 259; tr. 259 to 298; tr. 312 to 314; tr. 327 to 331; tr. 732 to 739; tr. 742 to 746. Other displays of prejudice occurred on tr. 153, tr. 157, tr. 186, tr. 244. Furthermore, when Sloan attempted to call present or former S.E.C. attorneys Nortman, Selvers, Rashes and Duffy as witness, the Court argued with Sloan and when these arguments failed the court repeatedly made menacing remarks. tr. 14; tr. 15; tr. 682-695; tr. 698-710. The record which was developed in the course of these antics clearly demonstrates that the district court must be reversed.

Finally, the summary dismissal of these three appeals is totally wrong as to defy analysis. On February 2, 1976, a date that the petitioner appeared in court to argue an appeal, the Second Circuit took a similar action in another case. See *Bordoni v. Twin Coast Newspapers et al.*, Docket Nos. 75-7512, 75-7513. Since that decision, like the decisions in the instant case, have not been and will not be officially reported, they establish in effect a secret law of the Second Circuit. If there is any justification for these dismissals, and it is submitted that there is and can be none, the principles set forth in *Taylor v. McKeithen*, 407 U.S. 191, 194 (1972) and in *NLRB v. Amalgamated Clothing Workers*, 430 F. 2d 966, 972 (5th Cir. 1970) require the panel of the Court of Appeals which dismissed the appeals to explain what it has done. Even the procedure which governs petitions for a rehearing and suggestions that the rehearing be en banc were not followed in these cases. The procedure is that a petition for a rehearing which contains a suggestion that the rehearing be en banc goes to every active judge of the court and each judge is given the opportunity to request that all of the judges be polled. See "Appeals to the Second Circuit" p. 49.

Inexplicably, this elementary procedure, which is followed in all other cases, has not been followed in this case and as a result the petitioner has been deprived of his rights to due process of law.

CONLCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Dated: September 10, 1976

Respectfully submitted,

SAMUEL H. SLOAN

APPENDIX A
ORDER DATED JANUARY 7, 1976 DISMISSING APPEAL FILED UNDER DOCKET NO. 74-1436

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee.

v.

SAMUEL H. SLOAN,
SAMUEL H. SLOAN & CO.,
Defendants-Appellants.

74-1436

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by some counsel, and submitted by appellant Sloan *in absentia.*

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the judgment of said District Court be and it hereby is *dismissed.* See *United States v. Sperling,* 506 F.2d 1323, 1345 n. 33 (2 Cir. 1974), *cert. denied,* 420 U.S. 962 (1975), and authorities there cited.

s/ William H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Thomas J. Meskill
Thomas J. Meskill
Circuit Judges.

APPENDIX B
ORDER DATED JANUARY 7, 1976 DISMISSING APPEAL FILED UNDER DOCKET NO. 75-7046

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

CANADIAN JAVELIN, LIMITED,
JOHN C. DOYLE,
WILLIAM W. WISMER,
Defendants-Appellees,

SAMUEL H. SLOAN,
Applicant for Intervention-Appellant.

75-7046

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by some counsel, and submitted by appellant Sloan *in absentia.*

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the order of said District Court be and it hereby is *dismissed.* See *United States v. Sperling,* 506 F.2d 1323, 1345 n. 33 (2 Cir. 1974), *cert. denied,* 420 U.S. 962 (1975), and authorities there cited.

s/ Wm. H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Thomas J. Meskill
Thomas J. Meskill
Circuit Judges.

APPENDIX C
ORDER DATED JANUARY 7, 1976 DISMISSING APPEAL FILED UNDER DOCKET NO. 75-7056

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

SAMUEL H. SLOAN, individually and d/b/a SAMUEL H. SLOAN & COMPANY,
Defendant-Appellant.

75-7056

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by some counsel, and submitted by appellant Sloan *in absentia.*

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the order of said District Court be and it hereby is *dismissed.* See *United States v. Sperling,* 506 F.2d 1323, 1345 n. 33 (2 Cir. 1974), *cert. denied,* 420 U.S. 962 (1975), and authorities there cited.

s/ Wm. H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Thomas J. Maskill
Thomas J. Maskill
Circuit Judges.

APPENDIX D

ORDER DATED MARCH 15, 1976 DENYING MOTION FOR REINSTATEMENT OF APPEALS NUMBERED 74-1436, 75-7046 AND 75-7056.

UNITED STATES COURT OF APPEALS

PRO SE
2/26/76
74-1436
75-7046
75-7056

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of March, one thousand nine hundred and 76.

Samuel H. Sloan, et al.,

Appellants.

v.

Securities & Exchange Commission,

Appellee.

A motion having been made herein by Appellant pro se for reinstatement of appeals numbered 74-1436, 75-7046 and 75-7056

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied in all respects.

s/ Wm. H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Thomas J. Meskill
Thomas J. Meskill
Circuit Judges

WHT EVG TJM

APPENDIX E
ORDER DATED APRIL 13, 1976 DENYING PETITION FOR A REHEARING AND SUGGESTION THAT THE REHEARING BE EN BANC.

UNITED STATES COURT OF APPEALS

PRO SE
3/31/76
74-1436
75-7046
75-7056

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of April, one thousand nine hundred and seventy-six.

Samuel H. Sloan,

Appellant,

v.

Securities & Exchange Commission,

Appellee.

A motion having been made herein by Appellant Sloan pro se for reconsideration of the denial of reinstatement of appeals numbered 74-1436, 75-7046 and 75-7056; rehearing with a suggestion of rehearing *en banc.*

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied. Denied in all respects.

s/ Wm. H. Timbers
WILLIAM H. TIMBERS

s/ Ellsworth Van Graafeiland
ELLSWORTH VANGRAAFEILAND

s/ Thomas J. Meskill
THOMAS J. MESKILL
Circuit Judges

WHT EVG TJM

APPENDIX F
OPINION DATED AUGUST 16, 1973 DENYING MOTION FOR DISCOVERY.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

SAMUEL H. SLOAN & CO. and Samuel H. Sloan, Defendants.

No. 71 Civ. 2695.

United States District Court,
S.D. New York.
Aug. 16, 1973.

ROBERT J. WARD, District Judge.

This is a motion by defendants for an order pursuant to Rule 34(b), Fed.R.Civ.P. requiring plaintiff to produce for inspection and copying the transcript of an administrative hearing held in the Matter of Samuel H. Sloan, et ano. (Adm.Pro. File No. 3-3680). For the reasons hereinafter stated, the motion is denied.

On April 25, 1972, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings against Samuel H. Sloan & Co. and Samuel H. Sloan ("respondents") alleging that respondents had wilfully violated the Commission's Net Capital and Bookkeeping Rules, as well as other provisions of the federal securities laws. The purpose of that proceeding was to determine whether the various allegations set forth in the Commission's order for proceedings were true and, if so, what, if any, remedial action was appropriate in the public interest.

From October 30, 1972 to November 1, 1972, a hearing

in the matter was held before an Administrative Law Judge. Sloan appeared and was represented by counsel. A transcript of the hearing was prepared by a reporter employed by the C.S.A. Reporting Service and, at the conclusion of the hearing, all parties were entitled to purchase a copy of the transcript, numbering some 443 pages. Respondents chose not to do so.

At the conclusion of the hearing, the parties were called upon to file proposed findings of fact and conclusions of law. The Commission, which had purchased a copy of the transcript, allowed Sloan's counsel to come to its offices and examine its copy of the transcript while he was preparing his proposed findings.

After proposed findings had been filed by both sides, the Administrative Law Judge rendered an initial decision in which he found that the evidence adduced at the hearing supported the Commission's allegations and revoked Sloan & Co.'s broker-dealer registration and barred Sloan from association with any broker-dealer.

Sloan's petition for a review of the Administrative Law Judge's initial decision was granted by the Commission on May 21, 1973 and Sloan was ordered to file his brief within 30 days of receipt of the order for review. This action by the Commission had the effect of staying the sanctions imposed by the Administrative Law Judge, pending review by the Commission. Thus, Sloan was permitted to remain active in the securities business for the time being.

Previously, on May 16, 1973, Sloan's counsel had requested that the Commission release the transcript for his use for one week. The Commission refused counsel's request. On June 8, simultaneously with the filing of this motion, Sloan's counsel requested a 30 day extension for the filing of his brief in the administrative proceeding, stating that he was unable to make use of the New York Regional Office's transcript of the hearing.

The purpose of discovery is to enable a party to discover and inspect material information which by reason of an opponent's control, would otherwise be unavailable for judicial scrutiny. Rule 34 of the Federal Rules of Civil Procedure provides that relevant and non-privileged documents and objects in the possession of one party be made available to the other, thus, eliminating surprise and permitting the issues to be simplified and the trial to be expedited. United States v. Procter and Gamble Co., 14 F. R.D. 230, 232 (D.C.N.J. 1953).

In the instant case the transcript of this public hearing is equally available to all parties on payment of the lawfully prescribed costs. To date, Sloan has chosen not to purchase a copy. Instead he seeks to obtain a copy by a discovery motion.

It is well established that discovery need not be required of documents of public record which are equally accessible to all parties. Komow v. Simplex Cloth Cutting Machine Co., Inc., 109 Misc. 358, 179 N.Y.S. 682 (1919), aff'd, 191 App.Div. 884, 180 N.Y.S. 942 (1920). The Court in *Komow* held that a party is not entitled to discovery and inspection of matters of public record and denied plaintiff's motion for discovery and inspection of the certificate of incorporation of defendant corporation. The transcript of Administrative Pro. File No. 3-3680 is available to anyone, including Sloan, by purchase from CSA Reporting Service. Like the certificate of incorporation in *Komow* the requested transcript is a public document available to movant and thus, not discoverable from the Commission.

It has been clear since Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) that indigent criminal defendants must be provided with stenographic transcripts or otherwise afforded the opportunity for adequate and effective appellate review. However, in the case at bar, which, of course, is not a criminal action, Sloan makes no claim as to his inability to pay for the transcript. Absent a

claim and proof of Sloan's inability to pay, it must be assumed that Sloan is financially able to purchase the transcript he desires.

Rather than asserting that Sloan cannot afford to purchase the transcript, his counsel claims that "The expense of these transcripts are paid by funds alloted to plaintiff from taxes produced by the people of these United States and defendant Sloan is one of these people." While imaginative, such an argument is not persuasive.

Rule 26(c) of the Federal Rules of Civil Procedure provides that discovery should be allowed unless the hardship is unreasonable in the light of the benefits to be secured from the discovery. Wright and Miller, Federal Practice and Procedure, Sec. 2214, p. 648.

To grant Sloan's motion would in the future allow all respondents in administrative proceedings, regardless of how many parties may be involved, to obtain a copy of the transcript on motion, thereby requiring the Commission to purchase additional copies of the transcript and placing an undue burden on the Commission.

The motion is in all respects denied.

It is so ordered.

APPENDIX G
DECISION DATED NOVEMBER 20, 1973 DENYING MOTION TO DISMISS THE COMPLAINT AND FOR VARIOUS OTHER RELIEF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

71 Civ. 2695
R.J.W.

SAMUEL H. SLOAN & CO.
SAMUEL H. SLOAN,

Defendants.

Defendant Samuel H. Sloan ("Sloan") moves to dismiss the complaint, or in the alternative, to vacate the preliminary injunction in this action and for various other relief. For the reasons set forth below, the motion is in all respects denied.

On June 24, 1971, this Court entered an order, on consent, which preliminarily enjoined Samuel H. Sloan & Co. ("Sloan & Co.") and Sloan from further violations of the Securities and Exchange Commission's ("the Commission") net capital and bookkeeping rules. Thereafter, on April 25, 1972 the Commission instituted public administrative proceedings against Sloan & Co. and Sloan based upon allegations by its Division of Enforcement that Sloan & Co. and Sloan had wilfully violated the net capital and bookkeeping rules as well as other provisions of the federal securities laws. The purpose of those proceedings was to determine whether the allegations of violations set

forth in the Commission's Order for Proceedings were true and, if so, what, if any, remedial action was appropriate.

A hearing was held beginning on October 30, 1972 and continuing through November 1, 1972 before an Administrative Law Judge. Sloan was represented by Robert W. Taylor, the attorney who has represented him in the instant action up to the filing of the present motion which was made *pro se*.

On April 25, 1973 the Administrative Law Judge filed his Initial Decision in which he concluded that "the record of the registrant and Sloan as evidenced by the violations found in this proceeding, reflect an unwillingness or a lack of capacity to operate as a broker-dealer in conformity with applicable law and regulations." He ordered that the registration of Sloan & Co. as a broker-dealer be revoked and that Sloan be barred from association with a broker-dealer. This decision is presently on review to the Commission.

Since February, 1973 this Court has held four pre-trial conferences all of which were attended by counsel for the parties. At the most recent conference, in October, 1973, the Court set the case down for trial on December 10, 1973, all efforts to dispose of this matter by agreement of the parties having proved futile.

Sloan's *pro se* motion for an order dismissing the complaint or vacating the preliminary injunction and other relief, served approximately one month before trial in this matter is scheduled, appears to be a misguided attempt to impede rather than advance the disposition of this litigation. The Court notes that Mr. Sloan is not a stranger to litigation in this Court. In *Sloan v. Nixon* (73 Civ. 2230), an attempt was made to enjoin President Nixon from continuing in office. Judge Bauman, in dismissing that suit, commented that Sloan's action was the "nadir" of "many misguided lawsuits" seen over a lifetime.

The issues raised by Sloan on the present motion are totally lacking in substance. His incomplete papers (no memorandum of law was filed) fail to present any facts or legal arguments to support his contention that the relief heretofore sought and obtained against him and his firm is unjustified. This decision will deal briefly with Sloan's contentions.

The plaintiff fails to state a claim upon which relief could be granted.

The claim on which this request for relief is based is that Sloan endangered the investing public by operating the firm of Sloan & Co. in violation of the federal securities laws. Specifically, at the time the preliminary injunction was entered, the complaint alleges that Sloan & Co. and Sloan were operating while in violation of the net capital rule. Sloan places great emphasis on the fact that the complaint contains a typographical error in that the words "now permitting . . ." read "not permitting . . ." with regard to net capital violations. However, a full reading of paragraph 10 of the complaint leaves no doubt that what is alleged is that from some time prior to January 29, 1971 to the date of the complaint, June 17, 1971, Sloan & Co. was violating and Sloan, aiding and abetting violations of the net capital rule.

Sloan's claim in his moving papers that there is no basis for an allegation of financial difficulty is one of the issues to be determined at the trial on December 10, 1973. Clearly, the complaint states a claim on which relief can be granted.

Plaintiff has failed to prosecute.

It is the general rule that a trial court has the inherent power to dismiss an action for failure to prosecute or to comply with the rules of federal procedure or any order of

the court. There is no evidence "that the plaintiff has been dilatory in prosecuting the case or inclined to deliberately disobey any order of the Court for the purpose of delay." *Meeker v. Rizley*, 324 F.2d 269, 271 (10th Cir. 1963). Nor has Sloan explained why he did not move earlier to lift the preliminary injunction. At the most recent pre-trial conference, approximately one month ago, the Court set December 10, 1973 as the trial date with the consent of counsel for the parties. Sloan's unsupported argument that the action should be dismissed for failure to prosecute is without merit.

The terms of the injunction have been fulfilled. Certain allegations in the complaint have been proven untrue and capital deficiencies, if any, have been cured."

The Commission has represented that it is prepared to prove that the terms of the injunction have been violated and that the net capital deficiencies which existed previously have re-occurred. If, in fact, any of the allegations of the complaint are untrue, Sloan will have the opportunity to demonstrate this at the forthcoming trial.

Sloan's claim at this late date that he was coerced into consenting to the preliminary injunction is unsupported by any credible evidence. Sloan argues that since his bank would not honor all of his checks, he was therefore coerced into consenting to the preliminary injunction. However, his claim of coercion is contradicted by the terms of the injunction which states that "No tender, offer, promise or threat of any kind whatsoever has been made by plaintiff, Securities and Exchange Commission by any principal, officer, agent, or representative thereof in consideration of the foregoing consent." On the present state of the record it would appear that Sloan voluntarily and on the advice of counsel consented to a preliminary injunction.

Plaintiff has failed to join a necessary party.

From the papers it is extremely difficult to ascertain Sloan's position in this regard. It appears, however, that reference is made to paragraph 12 of the complaint regarding the preparation of a financial statement which contained false information. Sloan is apparently claiming that the accountant or other party who prepared his financial statement should be joined as a necessary party. If such is, in fact, his claim, it is without merit. The responsibility for filing accurate reports with the Commission, is not delegable and therefore rests with Sloan.

The Court of Appeals for the Second Circuit has consistently dismissed petitions to review enforcement-related determinations of the Commission. *Independent Investors Protective League v. Securities and Exchange Commission*, No. 71-1924 (2d Cir., Nov. 15, 1971); *Leighton v. Securities and Exchange Commission*, No. 26,458 (2d Cir., Nov. 3, 1960), *certiorari denied*, 365 U.S. 888 (1961); *Cf. Peck v. Securities and Exchange Commission*, No. 22,829 (2d Cir., Apr. 7, 1952).

The Commission in enforcement proceedings, may determine whom it wishes to name as a defendant. It is not required to join all parties.

The Court lacks subject matter jurisdiction.

In the instant case, subject matter jurisdiction is expressly conferred by Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78aa.

The extent of the injunction places an unreasonable burden upon defendant.

The Court is of the view that the Commission in its original papers made a "proper showing" of need for

injunctive relief. *Securities and Exchange Commission v. Bennett & Co.*, 207 F. Supp. 919 (D.N.J. 1962); *Securities and Exchange Commission v. Broadwall Securities. Inc.*, 240 F. Supp. 962 (S.D.N.Y. 1965).

"Proper showing" has been defined as a "justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged . . ." in violation of the statutes involved. *Federal Trade Commission v. Rhoades Pharmacal Co.*, 191 F.2d 744, 747-748 (7th Cir. 1951). *The action is barred by res judicata.*

Inasmuch as there has been no final determination of this action by any court, *res judicata* does not apply. See *American S.S. Co. v. Wickwire Spencer Steel Co.*, 8 F. Supp. 562, 566 (S.D.N.Y. 1934), wherein the Court held that "the rule of *res judicata* is that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on the points and matters determined in the former suit".

The sections of the Securities Exchange Act of 1934 and the rules thereunder which the defendant is alleged to have violated are unconstitutional.

As Professor Loss notes, "The question of constitutionality of the SEC statutes generally belongs to a bygone day." 1 L. Loss, *Securities Regulation*, 178, n. 1, 2 ed. 1961. The constitutionality of the Securities Exchange Act has been upheld in a number of cases. *See, e.g., Wright v. Securities and Exchange Commission*, 112 F.2d 89 (2d Cir. 1940); *Charles Hughes & Co. v. Securities and Exchange Commission*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944).

The remaining contentions advanced by defendant in support of his motion to dismiss have been considered and found by this Court to be so totally lacking in merit as not to warrant discussion.

In seeking an order staying the effectiveness of any order which "might" be issued as a result of the administrative proceeding before the Commission, Sloan is premature. As noted above, the Initial Decision revoking Sloan's broker-dealer registration and barring him from being associated with any broker-dealer in the securities industry is presently on review to the Commission. Thus, "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" applies. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). In the event of an unfavorable decision, Sloan has a right to appeal to the proper Court of Appeals. Section 25 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78y.

Sloan's claim that the Initial Decision was based on false testimony by officers of the Commission and by improper conduct of the SEC attorney handling the case is likewise premature. Moreover, the credibility of the witnesses was for the trier of the facts, in this case the Administrative Law Judge. This claim as well as the claim of alleged improper conduct of the SEC attorney handling the case should in the first instance be presented to the Commission.

Finally, Sloan requests discovery. As noted above, throughout this entire proceeding, Sloan has been represented by counsel. Robert W. Taylor, Esq. represented him at all pre-trial conferences in this matter. At a pre-trial conference on February 9, 1973, Mr. Taylor requested adequate time for discovery. The Court granted the request and allowed Mr. Taylor 90 days. At this late date with the case scheduled for trial in less than one

month, allowing Sloan to commence discovery proceedings would only serve to unreasonably delay the trial which was scheduled for December 10, 1973 with the consent of Mr. Taylor.

Moreover, Sloan's request to depose the Administrative Law Judge together with the various Commission attorneys and investigators would be burdensome and oppressive as well as improper. See *Hickman v. Taylor,* 329 U.S. 495 (1947).

In any event, the Commission points out that Sloan is aware of the bulk of its evidence, since it has been previously presented in the public administrative proceeding and is contained in the transcripts of the proceeding.

Accordingly, the motion is in all respects denied.

It is so ordered.

Dated: November 20, 1973

s/ Robert J. Ward
U.S.D.J.

APPENDIX H

OPINION DATED JANUARY 7, 1974 GRANTING APPLICATION FOR A JUDGMENT OF PERMANENT INJUNCTION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

SAMUEL H. SLOAN and Samuel H. Sloan & Co.,
Defendants.

No. 71 Civ. 2695.

*****

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT J. WARD, District Judge.

On June 17, 1971, plaintiff Securities and Exchange Commission ("Commission") filed a complaint against defendants Samuel H. Sloan ("Sloan") and Samuel H. Sloan & Co. ("Sloan & Co.") seeking injunctive and other relief for alleged violations of Sections 15(b)(1), 15(c)(3) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78*o*(b)(1), 78*o*(c)(3) and 78q(a), and Rules 17 C.F.R. 240.15b1-2, 15c3-1, 17a-3 and 17a-4 promulgated thereunder &"Broker-Dealer Registration", "Net Capital" and "Bookkeeping Rules").

Thereafter, on June 24, 1971, this Court entered an order, on consent, which preliminarily enjoined defendants from further violations of the net capital and bookkeeping requirements of the federal securities laws.

The action was tried, non-jury, in December 1973 and the Court now makes the following findings of fact and conclusions of law:[1]

Findings of Fact

1. The Commission is authorized to bring this action pursuant to Section 21(e) of the Exchange Act, as amended, 15 U.S.C. §78u(e).

2. Sloan & Co. is a sole proprietorship and had its office and place of business at 120 Liberty Street, New York, New York. The office was closed on August 16, 1973. Sloan & Co. has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act, 15 U.S.C. §78*o*(b), since May 10, 1970. Sloan is the sole proprietor and manager of Sloan & Co.

1. *Violations of Section 17[a] of the Exchange Act, 15 U.S.C. §78q*(a), *and Rule 17a-3 promulgated thereunder.*

3. During January and February 1971, Arthur Bruder ("Bruder"), an investigator on the staff of the Commission, visited the office of Sloan & Co. for the purpose of determining whether the books and records of Sloan & Co. were being maintained properly and on a current basis.

4. During March, April, May, June and August 1971, Sheldon Kanoff ("Kanoff"), also an investigator on the staff of the Commission, visited the office of Sloan & Co. for the same purpose.

5. During May, June and August 1973, George Appoldt ("Appoldt"), another investigator on the staff of the Commission, visited the office of Sloan & Co. for a similar purpose.

6. On August 16, 1973, Kanoff, accompanied by Jerome Selvers ("Selvers"), an attorney on the staff of the Commission, visited the office of Sloan & Co. for the same purpose.

1. At trial, the Commission abandoned all claims other than its claim for a permanent injunction.

7. As a result of his January 1971 examination of Sloan & Co.'s books and records, Bruder determined that as of January 15, 1971, Sloan & Co. failed to maintain properly and keep current the following books and records: (a) General Ledger — not properly maintained in that capital and income and expense items were improperly recorded; (b) Trading Account — not maintained currently; (c) Trial Balance — not prepared; (d) Account Record of bank balances — not maintained; (e) Fail to Receive Ledger; Fail to Deliver Ledger; Stock Record — not maintained currently.

8. Sloan was informed by the Commission of Bruder's determination and was asked to furnish a trial balance and supporting schedules. A trial balance was submitted on January 18, 1971. However, supporting schedules showing firm inventory and fails to deliver and receive were not furnished and Bruder was unable to make a capital computation based on the submission.

9. On February 25, 1971, Bruder observed that neither the stock record nor the customer ledger of Sloan & Co. was up to date, and, since capital was not properly recorded, that the general ledger was inaccurate.

10. On March 19, 1971, Kanoff observed that the books and records of Sloan & Co. indicated a capital contribution of $58,000 by Mr. Joseph Iny. In fact, Mr. Iny never contributed capital to Sloan & Co. but was, instead, a customer of the firm. In addition, although the books and records of the firm included shares of Kaiser Steel Industries in the firm trading account, these shares were at all times part of Mr. Iny's customer account.

11. On April 8, 1971, Kanoff observed that Sloan & Co. did not have a complete set of books and records. All that he found were machine run debit and credit slips from

which a capital contribution could not be prepared and which did not provide the information which is to be included in books and records required to be maintained under Rule 17a-3.

12. On May 6, 1971, Kanoff requested but did not obtain the delivery tickets relating to sales and, on June 9, 1971, Kanoff requested but did not obtain a trial balance as of the end of May 1971.

13. On August 12, 1971, Kanoff observed that the general ledger of Sloan & Co. was only posted through July 31, 1971, in violation of Rule 17a-3. This was less than two months after Sloan & Co. and Sloan had consented to a preliminary injunction enjoining them from further violations of the rules.

14. Moreover, the firm's trading inventory submitted to the Commission in August 1971 was inaccurate, in that it included certain securities which had been transferred to the firm of J.S. Love & Co., and therefore, were not in the possession of Sloan & Co.

15. Sloan & Co. did not prepare monthly capital computations from January 1, 1971 through December 31, 1971, as required by Rule 17a-3.

16. On May 29 and 30, 1973, Appoldt observed entries on the books and records of Sloan & Co. indicating payments as consulting fees but no entries reflecting employees' salaries. Attempts to verify these entries were unsuccessful. On the other hand, Hafdis Simonarson testified that she was employed by Sloan & Co. from September 1972 to May 1973 and that there was at least one other employee, Johanna Baldursttir.

17. On August 2, 1973, Appoldt observed that the firm's books and records were not current as they were only posted through July 30, 1973.

18. The trial balance submitted by Sloan & Co. as at

August 2, 1973 fails to disclose trades in Canadian Javelin, Ltd. ("Canadian Javelin") stock. In addition, the trial balance fails to disclose that shares of Canadian Javelin were borrowed by Sloan & Co. and were, in fact, owed to other broker-dealers.

19. On August 16, 1973, Appoldt visited Sloan & Co. to inspect the firm's capital computations. Sloan did not furnish them and informed him that he would bring them to the Commission's New York Regional Office later that day. When Sloan failed to appear at the Commission's office, Kanoff and Selvers went to Sloan & Co.'s offices and asked Sloan for the firm's capital computations. Sloan was unable to produce the requested capital computations.

20. At no time since August 16, 1973 has Sloan made his books and records available for inspection by the Commission staff, although numerous efforts were made by the Commission to arrange such an inspection.

II. *Violations of Section 15[c][3] of the Exchange Act, 15 U.S.C. §78o[c][3] and Rule 15c3-1 promulgated thereunder.*

21. On January 21, 1971, Bruder prepared from the books and records of Sloan & Co. a trial balance as of January 18, 1971. Based upon this trial balance and other information obtained from the books and records of Sloan & Co. and using the pink sheets and public journals for pricing purposes, Bruder determined that Sloan & Co. had an adjusted net capital deficiency of $28,016 as of January 18, 1971.[2]

22. Thereafter, Bruder prepared from the books and records of Sloan & Co. a trial balance as of January 29,

2 The adjusted net capital is current assets, less liabilities, less deductions to allow for market fluctuations for securities held. When this figure is less than zero dollars, a deficit results. The total deficiency is this deficit, plus the required minimum capital, at that time $5,000 and later $15,000.

1971. Based upon this trial balance and other information obtained from the books and records of Sloan & Co. and using the pink sheets and public journals for pricing purposes, Bruder determined that Sloan & Co. had an adjusted net capital deficiency of $11,912 as of January 29, 1971.

23. On March 18, 1971, Kanoff prepared from the books and records of Sloan & Co. a trial balance as of February 26, 1971. In determining the net capital of Sloan & Co., Kanoff treated $58,000 owed to Mr. Joseph Iny as a liability instead of a capital item. Using the pink sheets for pricing purposes, Kanoff determined that Sloan & Co. had a net capital deficiency of $15,961 as of February 26, 1971.

24. Sloan & Co. submitted to the Commission a balance sheet and supporting documents as of June 30, 1971. Sloan & Co.'s own computations prepared by its accountant, Robert W. Taylor & Co., reflected a net capital deficit of $19,221. Based on the submitted documents, Kanoff determined that Sloan & Co. had a net capital deficiency of $24,222 as of June 30, 1971.

25. Sloan & Co. submitted to the Commission trial balances and supporting schedules as of July 31, August 31, September 30, October 8, November 30, and December 31, 1971 and January 31, 1972. Using the pink sheets for pricing purposes, Kanoff determined that Sloan & Co. had net capital deficiencies as follows:

July 31, 1971 0us1	70,864.
August 31, 1971	$16,588.
September 30, 1971	$24,529.
October 8, 1971	$ 8,345.
November 30, 1971	$ 9,810.
December 31, 1971	$13,480.
January 31, 1972	$ 718.

26. Subsequent to his determination of net capital deficiencies as of July 31, August 31, September 30, October 8, November 30, and December 31, 1971, Kanoff met with the accountant for Sloan & Co. and based upon additional information furnished at that time, Kanoff adjusted the net capital deficiencies to reflect capital deposits by Sloan & Co. which had previously been treated as liabilities. After including these additional funds as capital, Sloan & Co. still had net capital deficiencies as follows:

July 31, 1971	$70,064.
August 31, 1971	$15,789.
September 30, 1971	$10,729.
October 8, 1971	$ 7,545.
November 30, 1971	$ 4,010.
December 31, 1971	$ 4,557.

27. During the period from January 1971 through January 31, 1972, Sloan & Co. continued to effect transactions in securities in interstate commerce and otherwise than on a national securities exchange as demonstrated by the following:

(a) In January 1971, Bruder overheard telephone conversations wherein Sloan gave or received quotations on prices of stock, and, in addition, found changes in the firm's inventory;

(b) On March 19, 1971, Kanoff overheard Sloan giving quotations on prices of stock, and, in addition, observed confirmations lying about the office, securities being delivered by runners and entries in the firm's checkbooks;

(c) On April 8, 1971, Kanoff overheard telephone conversations wherein Sloan gave or received quotations on securities, and, in addition, observed runners entering and leaving the office and observed confirmations and securities on the premises;

(d) On May 6, 1971, Kanoff overheard telephone conversations concerning securities and observed the presence of runners and securities in the office;

(e) On August 10, 1971, Kanoff observed confirmations with current dates about the office and securities in view;

(f) On August 12, 1971, Kanoff overheard telephone conversations concerning securities, and observed recent confirmations of trades and the preparation of tickets for the firm's record keeping service;

(g) A comparison of the trial balances for July 1971 and August 1971 indicates that Sloan & Co. was receiving and delivering securities, and paying checks;

(h) A comparison of the trading account for the months ending July 31, 1971, August 31, 1971 and September 30, 1971 indicates that Sloan & Co. entered into at least seven transactions which represented new business;

(i) During the month of August 1971, Sloan & Co. transferred to the brokerage firm of J.S. Love & Cp. a number of securities, including securities resulting from the transaction of new business, which, as noted above, were represented according to the firm trading inventory submitted to the Commission, as being in the possession of Sloan & Co.;

(j) In December 1971, Sloan & Co. applied to the National Quotation Bureau for listing in the pink sheets;

(k) In January 1972, Sloan & Co. listed bid and asked quotations for a number of securities with the National Quotation Bureau, and in the pink sheets.

28. On May 29 and 30, 1973, Appoldt prepared from the books and records of Sloan & Co. a trial balance as of May 24, 1973. Based upon this trial balance and other information obtained from the books and records of Sloan & Co. and using the pink sheets and public journals for pricing purposes, Appoldt determined that Sloan & Co. had a net capital deficiency of $4,383 as of May 24, 1973.

29. On August 6, 1973, Sloan & Co. submitted to the Commission a trial balance containing only a schedule of

positions as of August 2, 1973. This schedule omitted all trades in Canadian Javelin. Based upon this trial balance, Appoldt determined that Sloan & Co. had a net capital deficiency of $20,046 as of August 2, 1973.

30. The parties have stipulated for the purposes of this lawsuit, that as a result of trading in Canadian Javelin, defendants sustained a loss of $40,000. Thus, Sloan & Co. had a net capital deficiency in excess of $20,046 as of August 2, 1973.

31. During the months of May 1973 and August 1973, Sloan & Co. continued to effect transactions in securities in interstate commerce and otherwise than on a national securities exchange as demonstrated by the following:

(a) An examination of the firm's trial balances, as well as the fact that in May 1973, Appoldt overheard telephone conversations concerning securities and observed confirmations lying about the firm's office;

:b; in August 1973, Kanoff observed confirmations and order tickets, some of which bore current dates, and securities lying about the firm's office, as well as entries in the firm's checkbooks.

Conclusions of Law

1. This Court has jurisdiction under Section 27 of the Exchange Act, 15 U.S.C. §78aa.

2. From on or about January 15, 1971 through January 31, 1972, as well as from May 1973 to date, Sloan & Co., under the direction of Sloan wilfully violated Section 17(a) of the Exchange Act, 15 U.S.C. §78a(a), and Rules 17a-3 and 17a-4 promulgated thereunder, in that Sloan & Co. failed to properly maintain, keep current and preserve certain of its books and records reflecting all assets and liabilities, income and expense and capital accounts; A securities record or ledger; A firm trading account; Ledgers (or other records) reflecting securities failed to receive and

failed to deliver; Trial balances (or other records of all ledger accounts); and Computations of aggregate indebtedness and net capital.

3. From on or about January 18, 1971 through January 31, 1972 as well as May and August 1973, Sloan & Co., under the direction of Sloan wilfully violated Section 15(c)(3) of the Exchange Act, 15 U.S.C. §78*o*(c)(3), and Rule 15c3-1 promulgated thereunder, in that Sloan & Co. effected transactions in securities (other than exempted securities or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange while and at a time when its aggregate indebtedness to all other persons exceeded 2,000 per centum of its net capital and, in addition, its net capital was less than $5,000 or $15,000 as required.

4. While engaged in the above described acts, practices and course of business, defendants, directly and indirectly, made use of the mails and means and instruments of transportation and communication in interstate commerce, and of the means and instrumentalities of interstate commerce, and effected the transactions otherwise than on a national securities exchange.

5. The issuance of a permanent injunction is necessary to protect the public against the continuation or repetition of the above described violations and, unless permanently enjoined, there is a likelihood that the defendants will continue to engage in violations of the Exchange Act and the Rules promulgated thereunder.

Settle judgment on notice.

APPENDIX I

JUDGMENT OF PERMANENT INJUNCTION DATED JANUARY 14, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civil 2695 (RJW)

SECURITIES AND EXCHANGE COMMISSION
Plaintiff,

-against-

SAMUEL H. SLOAN & CO., SAMUEL H. SLOAN,
Defendants.

A Complaint in this action having been filed on June 17, 1971, and this action having come on before the Court, the Honorable Robert J. Ward, District Judge, presiding and an evidentiary hearing having been held and the Court's Findings of Fact and Conclusions of Law, pursuant to Rule 52 of the Rules of Civil Procedure for the United States District Courts, having been filed on January 7, 1974, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants Samuel H. Sloan & Co. and Samuel H. Sloan, their officers, nominees, agents, servants, employees, attorneys and those persons in active concert or participation with them and each of them, be and they hereby are permanently enjoined from:

(1) Directly or indirectly making use of the mails or means or instrumentalities of interstate commerce to effect any transactions in or to induce or to attempt to induce the purchase of securities

while registered with the Commission as a broker-dealer in securities:

(a) while and at a time when the aggregate indebtedness of defendant Sloan & Co., or any other registered broker-dealer of which defendant Sloan becomes a principal or controlling person, to all other persons exceeds two thousand (2,000) per centum of its net capital as required by Section 15(c)(3) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(3) and Rule 17 C.F.R. 240.15c3-1 thereunder;

(b) while and at a time when the adjusted net capital of defendant Sloan & Co. or any broker-dealer registered with the Commission of which Sloan becomes a principal or controlling persons is less than a minimum as required under the Net Capital Rule of the Securities Exchange Act of 1934; and

(c) while and at a time when defendant Sloan & Co.'s books and records or those of any broker-dealer registered with the Commission of which Sloan becomes a principal or a controlling person are not made, kept and maintained pursuant to Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a) and Rules 17 C.F.R. 240.17a-3 and 17a-4 thereunder.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this matter for all purposes.

s/Robert J. Ward
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 18, 1974

Judgment entered Jan. 22, 1974

s/Raymond F. Burghardt, Clerk

APPENDIX J

OPINION DATED OCTOBER 29, 1974 DENYING A MOTION TO INTERVENE AND FOR AN ORDER VACATING CONSENT JUDGMENTS.

SECURITIES AND EXCHANGE COMMISSIONER,
Plaintiff,

v.

CANADIAN JAVELIN LIMITED et al.,
Defendants.

No. 73 Civ. 5074—LFM. United States District Court.
S.D. New York.
Oct. 29, 1974

Motion to intervene in enforcement action brought by Securities and Exchange Commission to obtain an order vacating consent judgments. The District Court, MacMahon, J., held that since the consent judgments would have neither res judicata, collateral estoppel, nor stare decisis effects on the proposed intervenor's action against the defendants, he was not entitled to intervene as of right; that because intervention would prejudice the rights of the parties and the public by upsetting a carefully negotiated settlement, proposed intervenor was not entitled to permissive intervention; that proposed intervenor was not entitled to discovery of transcripts of depositions of two defendants; and that proposed intervenor was not entitled to leave to appeal.

Motions denied.

1. Federal Civil Procedure

Where consent judgments entered in enforcement action by SEC would have neither res judicata, collateral estoppel,

nor stare decisis effects on proposed intervenor's action for securities frauds against defendants, proposed intervenor was not entitled to intervene as of right. Fed.Rules Civ.-Proc. rule 24&a0, 28 U.S.C.A.

2. Federal Civil Procedure 331

Where intervention following entry of consent judgment in SEC enforcement action would prejudice rights of parties and public by upsetting carefully negotiated settlement, and proposed intervenor's interest in participating in action was purely private interest, permissive intervention was denied. Fed.Rules Civ.Proc. rule 24(b), 28 U.S.C.A.

3. Federal Civil Procedure 1574

Where transcripts of depositions of defendants sought by a proposed intervenor did not exist, discovery request was denied.

4. Courts 405 (14.8)

Where party seeking to intervene in SEC enforcement action after consent judgment had been entered was denied intervention as of right and permissive intervention, District Court denied proposed intervenor's application for leave to appeal. 28 U.S.C.A. §1292(b); Fed.Rules Civ.-Proc. rule 24, 28 U.S.C.A.

Samuel H. Sloan, movant pro se.

Larry B. Grimes, Asst. Chief Trial Atty., SEC, Washington, D.C., for plaintiff; W. Michael Drake, Washington, D.C., of counsel.

Diamond & Golomb, P.C., New York City, for defendant Canadian Javelin Limited; Irving L. Golomb, New York City, of counsel.

Moses Krislov, Cleveland, Ohio, for defendants Doyle and Wismer.

OPINION

MacMAHON, District Judge.

Samuel H. Sloan moves, pro se, pursuant to Rule 24, Fed.R.Civ.P., to intervene in this enforcement action brought by the Securities and Exchange Commission (SEC), in order to obtain an order vacating the judgments of this court, entered by consent of the parties on July 17, 1974, and directing the parties to proceed to trial. He also seeks an order granting him discovery of the transcripts of the depositions of defendants John C. Doyle and William M. Wismer.

This action was settled by the entry of three separate consent judgments against the three defendants on July 17, 1974. The judgments permanently enjoin them from further violations of the securities laws and require defendants to undertake certain steps to ensure that further dissemination of corporate information will be in compliance with the securities laws. Canadian Javelin Limited also agreed to file with the SEC, within sixty days, or a longer period if the SEC consents, all required reports not currently on file and any necessary amendments to existing reports.

The proposed intervenor, Sloan, is no stranger to litigation in this court. On January 7, 1974, he and his brokerage firm were permanently enjoined from violating the Securities Exchange Act of 1934 and the SEC rules promulgated thereunder by failing to observe the net capital rules and failing to maintain proper records. SEC v. Sloan, 369 F.Supp. 996 (S.D.N.Y. 1974). Sloan has also brought several pro se actions in this court, including one against Doyle, Wismer, Canadian Javelin and forty-five other defendants, alleging various securities laws violations in the sale of Canadian Javelin stock. Sloan v. Canadian Javelin Ltd., 73 Civ. 3801; 73 Civ. 4403. Sloan attempted to consolidate those actions with the instant SEC enforcement

action, but his motion to consolidate was denied by Judge Bonsal on May 30, 1974. At the same time, Judge Bonsal dismissed the pro se actions with prejudice as to all defendants, except Doyle, Wismer and Canadian Javelin. Sloan v. Canadian Javelin Ltd., CCH Sec.L.Rep. [1973-74 Decisions] ¶94, 579 (S.D.N.Y. 1974). Judge Bonsal's decision is now pending on appeal.[1]

Sloan's interest in this litigation stems from his short sale of 33,400 shares of Canadian Javelin stock in July 1973. Shortly after the sale, the price of Canadian Javelin more than doubled, but Sloan claims to have suffered a large financial loss resulting from his inability to purchase shares to cover his short position due to the fact that trading in the stock has been suspended since November 29, 1973.

Rule 24, Fed.R.Civ.P., provides for intervention as of right (Subsection (a)) and permissive intervention (Subsection (b)). The former is permitted "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[1] Sloan, as a short seller of Canadian Javelin stock, undoubtedly has an interest in the transactions upon which this action is based. However, we can perceive no possible impairment of his interest due to the entry of consent judgments against the defendants in this case. The judgments here will have neither res judicata, collateral estoppel, nor *stare decisis* effects on Sloan's own action against these defendants.[2] In addition, Judge Bonsal held

1. See also, Sloan v. SEC, 74 Civ. 2792; Sloan v. Nixon, 60 F.R.D. 228 (S.D.N.Y.) Aff'd, 493 F.2d 1398 (2d Cir. 1974).

2. SEC v. Everest Management Corp., 475 F.2d 1236, 1239 (2d Cir. 1972).

that Sloan may file a new complaint against Canadian Javelin, Doyle and Wismer, if it meets "the requirements of the federal securities laws and the Federal Rules of Civil Procedure." Thus, regardless of the outcome of the appeal from Judge Bonsal's decision, Sloan's "interest" will be neither impaired nor impeded by denying intervention and allowing the consent judgments to stand. Moreover, our Court of Appeals has held that intervention as of right by victims of alleged securities frauds in an SEC enforcement action is inappropriate.[3] We conclude, therefore, that Sloan is not entitled to intervene in this action as of right.

[2] Permissive intervention is allowed under Rule 24(b) "when an applicant's claim or defense and the main action have a question of law or fact in common." However, "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Although Sloan's claim has numerous questions of law and fact in common with the SEC injunction action, we think it would be an abuse of our discretion to permit him to intervene because (1) intervention would prejudice the rights of the parties and the public by upsetting a carefully negotiated settlement, and (2) Sloan's interest in participating in this action at this stage does not justify intervention.

The SEC and the defendants have, through careful negotiation, worked out a settlement designed to ensure the defendants' compliance with the securities laws and to protect the public from further violation of those laws. Sloan has advanced no valid reason why we should vacate the consent judgments and put this case down for trial, thus causing great consternation to the parties, Canadian Javelin's stockholders and, possibly, the public. Congress has entrusted the SEC with the responsibility for protecting

3. SEC v. Everest Management Corp., supra, 475 F.2d at 1239; accord, SEC v. Vesco, 58 F.R.D. 182 (S.D.N.Y. 1973).

the public interest. The SEC has ably discharged that responsibility here by obtaining essentially all the relief originally sought in the complaint. Since we retain jurisdiction over these defendants, any violation of the consent judgments can be readily remedied by use of the contempt power. Moreover, we are not unmindful of the crucial part consent decrees play in the work of the SEC. If we were to allow a private party to vacate such a decree on the flimsy bases put forth here by Sloan, consent decrees might be discouraged and the work of the SEC impeded.[4]

In addition, Sloan's real interest in this case has little to do with that of the public. It is obvious from his affidavit that Sloan has two objectives in intervening: (1) a court order directing the SEC to allow resumption of trading in Canadian Javelin stock; and (2) a trial on the merits.

Sloan desires a resumption of trading because he can cover his short position in Canadian Javelin stock and avoid a huge financial loss only if the company's shares are again traded on the open market, and at a depressed price. Ordering such a resumption of trading, however, is not within our power in this case, as Sloan himself seems to realize, since he has recently brought an action against the SEC (Sloan v. SEC, Civ. 2792), seeking to have the SEC's suspension power declared unconstitutional. We leave determination of that issue to Judge Griesa, before whom it has been properly presented.

Sloan also insists that a full trial on the merits is appropriate here. We see nothing to be gained by the court, parties, public or anyone else, except Sloan, from such a trial, however, since the consent judgments have, for all intents and purposes, terminated this action. Sloan apparently seeks to lay the basis for his private action against these defendants by the trial of this SEC action, thus saving him time, money and effort. We see no reason to burden

4. SEC v. Everest Management Corp., supra, 475 F.2d at 1240.

the court with an unnecessary trial and waste the time of the parties and the public's money merely to make it easier for Sloan to prove his case.[5] We conclude, therefore, that intervention would unduly delay and prejudice adjudication of the rights of the original parties and the public interest and, therefore, deny permissive intervention.[6]

[3] Sloan also seeks discovery of the transcripts of the depositions of Doyle and Wismer. However, it appears that Wismer was never deposed and that Doyle's deposition, taken in Newfoundland, was never transcribed and has never been received by the SEC. Consequently, the transcripts sought do not exist, are not available to the SEC, and cannot be produced. Accordingly, Sloan's discovery request is denied.

[4] Finally, Sloan asks "leave" to appeal, apparently pursuant to 28 U.S.C. §1292(b). We do not think, however, that at this late date an appeal by Sloan, previously a stranger to this action, will "materially advance the ultimate termination of the litigation" and, therefore, deny his application for certification of a controlling question of law under 28 U.S.C. §1292(b).

Accordingly, the motion of Samuel H. Sloan to intervene under Rule 24, Fed.R.Civ.P., and to vacate the consent judgments entered July 17, 1974 is denied. Sloan's applications for discovery of the transcripts of the depositions of John C. Doyle and William M. Wismer and for certification of a controlling question of law, pursuant to 28 U.S.C. §1292(b), are also denied.

So ordered.

5. United States v. Automobile Mfrs. Ass'n, 307 F.Supp. 617, 621 (C.D.Cal.1969), aff'd sub nom. City of New York v. United States, 397 U.S. 248, 90 S.Ct. 1105, 25 L.Ed.2d 280 (1970).

6. United States v. National Bank & Trust Co. of Central Pa., 319 F.Supp. 930 (L.D.Pa. 1970).

APPENDIX K
JUDGMENT OF PERMANENT INJUNCTION AGAINST JOHN C. DOYLE DATED JULY 17, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

CANADIAN JAVELIN LIMITED
JOHN C. DOYLE
WILLIAM M. WISMER

Defendants.

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73 CIVIL 5074

JUDGMENT OF PERMANENT INJUNCTION AGAINST JOHN C. DOYLE AND CONSENT THERETO

Plaintiff Securities and Exchange Commission ("Commission") having filed a Complaint for Injunction and ancillary relief in this matter and it appearing to the Court from the annexed Consent, which is attached hereto and made a part hereof, that the defendant John C. Doyle ("Doyle") has admitted, solely for the purposes of this action and enforcement of this Judgment, the jurisdiction of this Court over him and over the subject matter of this action; and, without admitting or denying the other allegations of the Complaint, and solely for the purposes of this action, has consented to the entry of a Final Judgment of Permanent Injunction enjoining said defendant from engaging in acts and practices in connection with the offer, purchase and sale of securities which constitute and would constitute violations of Sections 5 and 17(a) of the

Securities Act of 1933, 15 U.S.C. 77e and 15 U.S.C. 77q(a), and Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 15 U.S.C. 78m(a), and Rules 10b-5, 17 CFR 240.10b-5, and 12b-20, 17 CFR 240.12b-20, 13a-1, 17 CFR 240.13a-1, and 13a-13, 17 CFR 240.13a-13 promulgated thereunder, and that plaintiff Commission and Doyle have waived entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure; and it further appearing therefore that this Court has jurisdiction over this defendant and over the subject matter of this action; the Court being fully advised in the premises and there being no just reason for any delay in the entry of this Judgment, it is hereby

I.

ORDERED, ADJUDGED AND DECREED that defendant Doyle is permanently enjoined and restrained from directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange

A. Obtaining money or property by making, or making, materially false and misleading statements or omitting to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, concerning but not limited to:

(1) the financial condition of Canadian Javelin Limited ("Javelin"), its subsidiaries, or affiliates;

(2) Javelin's right, capacity and ability to exploit any mineral discovery;

(3) any feasibility study related to Javelin's various business activities;

(4) the granting of mineral concessions to

Javelin, its subsidiaries, or affiliates;

(5) the present and potential impact of legislation or governmental acts affecting Javelin's business activities;

(6) discussions with others to arrange for financing of Javelin's various projects;

(7) discussions with others to arrange for the sale of the products of Javelin's various projects;

(8) the terms, conditions and timeliness of Javelin's contracts or letters of intent;

(9) the anticipated time needed before production on Javelin's various activities can be meaningfully commenced;

(10) the size of Javelin's various projects and developments;

(11) the profitability of Javelin's various enterprises;

(12) the requisite financing needed and available for any project or activity of Javelin;

(13) the business operations or capabilities of Javelin, its subsidiaries or affiliates; and

(14) other items of similar purport and object.

B. Employing any device, scheme or artifice to defraud.

C. Engaging in any act, practice or course of business which operates or would operate as a fraud and deceit upon any person,

in connection with the offer, purchase or sale of securities of Javelin, its subsidiaries or affiliates in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 CFR 240.10b-5 promulgated thereunder.

II.

ORDERED, ADJUDGED AND DECREED that defendant Doyle be permanently enjoined and restrained from directly or indirectly, by making use of the mails or the means and instruments of transportation and communication in interstate commerce, in the absence of applicable statutory exemptions;

(a) selling the securities of Javelin or any of its subsidiaries or affiliates through the use or medium of any prospectus or otherwise; or carrying or causing to be carried any security of Javelin or any of its subsidiaries or affiliates for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission with respect to such securities; and

(b) offering to sell the securities of Javelin or any of its subsidiaries or affiliates through the use or medium of any prospectus or otherwise unless and until a registration statement has been filed with the Commission with respect to such securities,

in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. 77e.

III.

ORDERED, ADJUDGED AND DECREED that defendant Doyle is permanently enjoined and restrained from directly or indirectly filing materially false and misleading annual and other periodic reports required to be filed with plaintiff Commission pursuant to Sections 13(a) and (b) and 15(d) of the Exchange Act relating to the securities of Javelin or any of its subsidiaries or affiliates.

IV.

IT IS FURTHER ORDERED that with respect to Canadian Javelin Limited, its subsidiaries, affiliates or successors in interest, defendant Doyle shall not engage in the dissemination of information to the public without the specific prior approval and at the direction of Javelin's standing compliance committee and the Special Counsel to said committee (all as described in Item IV of the Judgment of Permanent Injunction Against Canadian Javelin Limited and Stipulation and Consent With Respect Thereto entered into this date) and that he shall fully cooperate with and inform the compliance committee of the Board of Directors and its Special Counsel and shall make available to the committee all material information available to him as soon as reasonably possible; and that he shall report to the Commission on a periodic basis all of his transactions in the securities of Javelin or any of its subsidiaries.

Dated: New York, N.Y.
July 17, 1974

s/
United States District Judge

JUDGMENT ENTERED 7/18/74
s/ Raymond F. Burghardt
Clerk

APPENDIX L
CONSENT OF JOHN C. DOYLE TO JUDGMENT OF PERMANENT INJUNCTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
73 CIVIL 5074

Plaintiff,

-against-

CANADIAN JAVELIN LIMITED
JOHN C. DOYLE
WILLIAM M. WISMER

Defendants.

CONSENT

The defendant, John C. Doyle ("Doyle"), hereby consents and agrees as follows:

I.

The defendant, Doyle, for purposes of this action only and the enforcement of this Judgment enters a general appearance, acknowledges receipt of the Complaint filed herein and admits the jurisdiction of this Court over him and over the subject matter of this action.

II.

The defendant, Doyle, consents that this Court, forthwith and without further notice, may enter the foregoing attached Judgment of Permanent Injunction enjoining him from engaging in acts and practices in connection with the offer, purchase and sale of securities which constitute or

would constitute violations of Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 77q(a), Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5, 12b-20, 13a-1 and 13a-13, 17 CFR 240.10b-5, 17 CFR 240.12b-20, 17 CFR 240.13a-1 and 17 CFR 240.13a-13, promulgated thereunder.

III.

The defendant, Doyle, in consenting to the entry of the foregoing attached Judgment of Permanent Injunction, does so without admitting or denying any of the allegations made by the plaintiff Securities and Exchange Commission in its complaint.

IV.

The defendant, Doyle, waives entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure.

V.

The defendant, Doyle, states that no tender, offer, promise of threat of any kind whatsoever has been made by the plaintiff Securities and Exchange Commission, or any member, officer, agent or representative thereof in consideration for this Consent.

s/ John C. Doyle
John C. Doyle

SWORN TO at MONTREAL, on this 29th day of MAY, 1974

Dated: May 29, 1974

s/ Gerard Ducharme
Gerard Ducharme
Notary Public

APPENDIX M
JUDGMENT OF PERMANENT INJUNCTION AGAINST CANADIAN JAVELIN LTD. DATED JULY 17, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff.

-against-

CANADIAN JAVELIN LIMITED
JOHN C. DOYLE
WILLIAM M. WISMER
Defendants.

73 CIVIL 5074

JUDGMENT OF PERMANENT INJUNCTION AGAINST CANADIAN JAVELIN LIMITED AND STIPULATION AND CONSENT WITH RESPECT THERETO

Plaintiff Securities and Exchange Commission ("Commission"), having filed a Complaint for Injunction and ancillary relief in this matter and it appearing to the Court from the annexed Stipulation and Consent, which is attached hereto and made a part hereof, that the defendant Canadian Javelin Limited ("Javelin") has admitted, solely for the purposes of this action and enforcement of this Judgment, the jurisdiction of this Court over it and over the subject matter of this action; and, without admitting or denying the allegations of the Complaint, and solely for the purposes of this action, has consented to the entry of a Final Judgment of Permanent Injunction enjoining said

defendant from engaging in acts and practices in connection with the offer, purchase and sale of securities which constitute and would constitute violations of Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 15 U.S.C. 77q(a), and Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 15 U.S.C. 78m(a), and Rule 10b-5, 17 CFR 240.10b-5, Rule 12b-20, 17 CFR 240.12b-20, Rule 13a-1, 17 CFR 240.13a-1, and Rule 13a-13, 17 CFR 240.13a-13, promulgated thereunder, and that plaintiff Commission and Javelin have waived entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure; and it further appearing therefore that this Court has jurisdiction over this defendant and over the subject matter of this action; the Court being fully advised in the premises and there being no just reason for any delay in the entry of this Judgment, it is hereby

I.

ORDERED, ADJUDGED AND DECREED that defendant Javelin, its officers, agents, servants, employees, directors, and those persons in active concert and participation with it, are permanently enjoined and restrained from directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of a national securities exchange

A. Obtaining money or property by making, or making, materially false and misleading statements or omitting to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, concerning but not limited to:

(1) the financial condition of Javelin, its subsidiaries or affiliates;

(2) Javelin's right, capacity and ability to exploit any mineral discovery;

(3) any feasibility study related to Javelin's various business activities;

(4) the granting of mineral concessions to Javelin, its subsidiaries, or affiliates;

(5) the present and potential impact of legislation or governmental acts affecting Javelin's business activities;

(6) discussions with others to arrange for financing of Javelin's various projects;

(7) discussions with others to arrange for the sale of the products of Javelin's various projects;

(8) the terms, conditions and timeliness of Javelin's contracts or letters of intent;

(9) the anticipated time needed before production on Javelin's various activities can be meaningfully commenced;

(10) the size of Javelin's various projects and developments;

(11) the profitability of Javelin's various enterprises;

(12) the requisite financing needed and available for any project or activity;

(13) the business operations or capabilities of Javelin, its subsidiaries, or affiliates; and

(14) other items of similar purport and object.

B. Employing any device, scheme or artifice to defraud,

C. Engaging in any act, practice or course of business which operates or would operate as a fraud and deceit upon any person.

in connection with the offer, purchase, or sale of securities of Javelin, its subsidiaries or affiliates in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 CFR 240.10b-5 promulgated thereunder.

II.

ORDERED, ADJUDGED AND DECREED that defendant Javelin, its officers, agents, servants, employees, directors, and those persons in active concert and participation with it, are permanently enjoined and restrained from directly or indirectly, by making use of the mails or the means and instruments of transportation and communication in interstate commerce, in the absence of applicable statutory exemptions;

(a) selling the securities of Javelin or any of its subsidiaries or affiliates through the use or medium of any prospectus or otherwise; or carrying or causing to be carried any security of Javelin or any of its subsidiaries or affiliates for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission with respect to such securities; and

(b) offering to sell the securities of Javelin or any of its subsidiaries or affiliates through the use or medium of any prospectus or otherwise unless and until a registration statement has been filed with the Commission with respect to such securities,

in violation of Section 5 of the Securities Act of 1933, 15 U.S.C. 77e.

III.

ORDERED, ADJUDGED AND DECREED that defendant Javelin, its officers, agents, servants, employees, directors, and those persons in active concert and participation with it, are permanently enjoined and restrained from directly or indirectly filing materially false and misleading annual and other periodic reports required to be filed with plaintiff Commission pursuant to Sections 13(a) and (b) and 15(d) of the Exchange Act.

IT IS FURTHER ORDERED that defendant Javelin, within 60 days of the date of this Order or at such other time as the plaintiff Commission may by order allow, will

(1) make all required filings with the Commission not heretofore made;

(2) make any amendments and supplements to its present filings with the Commission as required by law; and

(3) disseminate to all shareholders such information as is necessary to bring to their attention corrections, amendments or supplements provided for in (2) above and shall advise them fully concerning the present status of the affairs of the company.

IV.

IT IS FURTHER ORDERED that:

1. The Board of Directors by causing Javelin to enter into this Judgment shall be fully and continuously responsible for carrying it out.

2. Javelin will be subject to the continuing jurisdiction of the Court with respect to this Judgment.

3. The management of Javelin shall propose directors, vote their shares, and shall solicit proxies for the election of directors, at least 40 percent of whom shall consist of outside independent directors who shall meet the following criteria to the satisfaction of the Commission:

(a) persons of integrity;

(b) persons not employed by Javelin or any of its subsidiaries or affiliates;

(c) persons not under the control of Javelin or any of its subsidiaries or affiliates in consequence of any significant business interest;

(d) persons who are not presently officers of Javelin;

(e) persons not presently controlled by those owning the controlling voting interest in Javelin.

4. Javelin, its officers and directors, by action of the Board of Directors, shall designate and at all times maintain an agent in the United States authorized to accept service of civil or administrative process relating to the activities of Javelin, its subsidiaries and affiliates, served by or on behalf of the Commission including subpoenas and complaint. Javelin shall at all times advise the Commission of the name and address of such agent. Anyone so served shall retain any defenses he or it may have under the law to such action, except lack of proper service.

5. All dissemination of information by Javelin or any of its subsidiaries to the public whether by means of press releases, reports, letters to shareholders, filings with regulatory agencies, press conferences, meetings with security analysts, or otherwise shall be made only through a public information officer of Javelin designated within thirty days of this Judgment for such purpose. No other officer or employee of Javelin shall engage in any such dissemination of information.

6. Javelin shall establish within thirty days of this Judgment a standing compliance committee. A majority of the standing committee shall consist of independent Board members meeting the requirements of paragraph 3 of this Judgment. The public information officer shall be a member of this committee. The standing committee shall pass on all information to be disseminated to the public.

Such committee will be fully responsible at all times to the full Board of Directors.

7. Javelin shall name a special independent outside counsel (hereinafter "Special Counsel") to the standing committee, which Special Counsel shall be satisfactory to the Commission. Special Counsel shall review the dissemination of all information to the public by Javelin or any of its subsidiaries, its officers and directors, and shall be authorized to take all reasonable steps to secure Javelin's compliance with the U.S. securities laws and shall make such inquiries as he deems necessary to see to it that this Judgment is being carried out. Special Counsel shall have no business or professional relationship with Javelin other than the performance of the functions set forth herein. Special Counsel shall notify the Commission and Javelin's Board of Directors in any respect in which he believes the Judgment is not being carried out and advise the Board as to the steps necessary to cure such failure.

8. Javelin shall instruct its general counsel to make himself available to the Special Counsel to the committee or to the Commission staff.

9. Javelin shall provide that Special Counsel to the Committee shall have complete access to all directors, officers, employees of Javelin, to members of the committee, and to all relevant papers and records of the Company so as to enable him to carry out his function.

10. In the event Special Counsel is denied access to documents, Javelin personnel or any other material information, he shall notify the Board of Directors and the Commission.

11. In the event that the Commission brings suit in the United States, or otherwise initiates any action to enforce compliance with this Judgment, Special Counsel shall (a) make a demand on the company's Board of Directors to take, in Canada, whatever steps they deem appropriate

under Canadian law to enforce compliance with such Judgment, (b) bring the matter to the attention of the authorities in Canada having jurisdiction for such action as may be appropriate and warranted under the circumstances.

12. Subject to the terms of paragraph 5, Javelin shall provide that neither John C. Doyle nor anyone else shall have responsibility or the right to disseminate information to the public on behalf of Javelin except upon the express request and prior approval of the compliance committee and Special Counsel.

13. If the Special Counsel refuses to carry out his function under the terms of this Judgment, or resigns, or is discharged or for any reason whatsoever ceases being Special Counsel, then Javelin shall appoint within a prompt and reasonable time another Special Counsel satisfactory to the Commission. If Javelin shall not have proceeded with reasonable diligence in the selection of a new Special Counsel when required, the Commission may move the Court for appropriate action. Special Counsel shall not be discharged except on notice in writing to the Commission stating the reasons for such discharge prior to the discharge of the Special Counsel.

14. Where disclosures outside the United States by Javelin, its subsidiaries, affiliates or representatives are required by the laws of Canada or of any other country or by the rules and regulations of any regulatory authority or stock exchange having jurisdiction, Special Counsel to the committee shall take such laws, rules or regulations into account in any review he may conduct.

15. The Commission may at any time apply to the Court for appropriate relief to enforce the terms of this Judgment.

16. This Judgment shall not be construed to limit the

Commission's authority otherwise to enforce compliance with the securities laws of the United States.

Dated: New York, N.Y.
July 17, 1974

s/
United States District Judge

JUDGMENT ENTERED 7-18-74
s/ Raymond F. Burghardt
CLERK

APPENDIX N
CONSENT OF CANADIAN JAVELIN LTD. TO JUDGMENT OF PERMANENT INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION
Plaintiff,

-against- 73 CIVIL 5074

CANADIAN JAVELIN LIMITED
JOHN C. DOYLE
WILLIAM M. WISMER

Defendants.

CONSENT

The defendant, Canadian Javelin Limited ("Javelin"), hereby consents and agrees as follows:

I.

The defendant, Javelin, for purposes of this action only and the enforcement of this Judgment enters a general appearance, acknowledges receipt of the Complaint filed herein and admits the jurisdiction of this Court over it and over the subject matter of this action.

II.

The defendant, Javelin, consents that this Court, forthwith and without further notice, may enter the foregoing attached Judgment of Permanent Injunction enjoining it from engaging in acts and practices in connection with the offer, purchase and sale of securities which constitute or

would constitute violations of Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 77q(a), Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 78m(a), and Rules 10b-5, 12b-20, 13a-1 and 13a-13, 17 CFR 240.10b-5, 17 CFR 240.12b-20, 17 CFR 240.13a-1 and 17 CFR 240.13a-13, promulgated thereunder.

III.

The defendant, Javelin, in consenting to the entry of the foregoing attached Judgment of Permanent Injunction, does so without admitting or denying any of the allegations made by the plaintiff Securities and Exchange Commission in its complaint.

IV.

The defendant, Javelin, waives entry of findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure.

V.

The defendant, Javelin, states that no tender, offer, promise or threat of any kind whatsoever has been made by the plaintiff Securities and Exchange Commission, or any member, officer, agent or representative thereof in consideration for this Consent.

Dated: May 29th, 1974

CANADIAN JAVELIN LIMITED
s/
Vice President and Acting President

SWORN TO at MONTREAL, on this 29th day of MAY, 1974

s/ Gerard Ducharme
Gerard Ducharme
Notary Public

CERTIFICATE OF RESOLUTION

I, P.J. DE SANTIS, Secretary of CANADIAN JAVELIN LIMITED, a Canadian corporation, hereby certify that the resolution attached hereto is a true and complete copy of a resolution adopted by the Board of Directors of Canadian Javelin Limited at a meeting duly held on May 28th, 1974 at which a quorum was present and acting throughout and that said resolution has not in any way been rescinded or modified and is in full force and effect as of the date hereof.

IN WITNESS WHEREOF, I have signed the Certificate as Secretary of the corporation and affixed the seal of the corporation on this 29th day of May, 1974.

s/ P.J. DeSantis
Secretary

SWORN TO at MONTREAL, on this 29th day of MAY, 1974

s/ Gerard Ducharme
Gerard Ducharme
Notary Public

RESOLVED, that P.J. DE SANTIS, Secretary of CANADIAN JAVELIN LIMITED, a Canadian corporation, be and he hereby is authorized and directed on behalf of CANADIAN JAVELIN LIMITED to consent to the entry of a Judgment of a Permanent Injunction in substantially the form annexed hereto in an action brought by the United States SECURITIES AND EXCHANGE COMMISSION, which Complaint alleges that CANADIAN JAVELIN LIMITED violated Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 15 U.S.C. 77q(a), and Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and 15 U.S.C. 78m(a), and Rules 10b-5, 17 CFR 240.10b-5 and 12b-20, 17 CFR 240.12b-20, 13a-1, 17 CFR 240.13a-1, and 13a-13, 17 CFR 240.13a-13 promulgated thereunder;

FURTHER RESOLVED, that the Secretary of CANADIAN JAVELIN LIMITED, a Canadian corporation, be and hereby is authorized and directed on behalf of CANADIAN JAVELIN LIMITED to designate an agent in the United States, who shall be authorized to accept service of civil or administrative process relating to the activities of the company, its subsidiaries and affiliates served by or on behalf of the SECURITIES AND EXCHANGE COMMISSION of the United States, including subpoenas and complaints;

FURTHER RESOLVED, that the provisions of ordering paragraph IV, subparagraphs 5 through 9 of the Judgment of Permanent Injunction Against Canadian Javelin Limited and Stipulation and Consent With Respect Thereto shall be complied with by the management upon the aforesaid Judgment becoming effective.

s/ P.J. DeSantis
Secretary
CANADIAN JAVELIN LIMITED

DATED: May 28th, 1974

SWORN TO at MONTREAL, on this 29th day of MAY, 1974

s/ Gerard Ducharme
Gerard Ducharme
Notary Public

APPENDIX O
TRANSCRIPT OF PROCEEDINGS OF JANUARY 17, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

v.

74 Civ. 5729

SAMUEL H. SLOAN, individually and d/b/a SAMUEL H. SLOAN CO.,

Defendant.

BEFORE: HON. ROBERT J. WARD,

District Judge.

New York, New York

January 17, 1975—3:30 p.m.

PRESENT:

WILLIAM D. MORAN,
Regional Administrator,
Securities and Exchange Commission,
by: WILLIAM NORTMAN, Esq.,
JEROME SELVERS, Esq., and
THOMAS TAYLOR, Esq., of Counsel.

SAMUEL H. SLOAN,
Pro se.
(in open court)

THE COURT: Since the motion here is by the Government, I will hear first from Government counsel.

Mr. Selvers.

MR. SELVERS: Your Honor, if it please the Court, my name is Jerome Selvers, counsel for the Commission.

Your Honor, we seek this afternoon an order of injunction enjoining Mr. Sloan from further violations of Section 17(a) and Rule 17A-4, commonly known as the bookkeeping provisions of the Securities Exchange Act of 1934.

In addition, we seek an order of injunction enjoining Mr. Sloan from further violations of Section 15(c) and Rule 15 C2-11 commonly known as the provisions for instituting quotations in over-the-counter securities.

Through the affidavits previously submitted and attached to the complaint in this action, we have shown cause to this Court. Mr. Sloan in the past two months has continuously conducted his business in contravention of these rules and regulations. Specifically, Mr. Sloan refuses to allow the Commission access as required under Rule 17 A-4 and examination rights as provided under 17(a) to determine whether Mr. Sloan is in fact maintaining his books and records as required by these sections and rules.

THE COURT: He challenges the constitutionality of the legislation?

MR. SELVERS: Yes, your Honor, that appears to be Mr. Sloan's contention.

We, of course, in a brief submitted previously to the Court, have detailed the law as it stands in this jurisdiction, relying on SEC v. Olsen, which holds that Mr. Sloan's privilege that he asserts, his Fifth Amendment privilege of self-incrimination, will not cover his books and records as they are quasi-public in nature.

It is also interesting to know, your Honor, that Mr. Sloan does business out of his personal residence, or a residence which he considers to be his home, at 1761 Eastburn

Avenue in the Bronx, and for purpose of the SEC's inspections and examinations, he wears one hat and claims it's his personal residence and that we are not entitled to examine his books and records. On the other hand, Mr. Sloan is actively conducting a securities business out of the same address. This is an address and a telephone number that is listed for brokers and dealers to contact him.

Clearly, Mr. Sloan is not entitled to claim a self-incrimination right regarding his books and records.

In addition, by denying the Commission the access which is clearly stated and to which the Commission clearly has a right under these sections, Mr. Sloan is denying the Commission the opportunity to determine whether or not he is in fact in compliance with the previous Court order of injunction of January 1974. We are unable to determine whether Mr. Sloan is maintaining his books and records in conformity with these rules.

In addition, your Honor, Mr. Sloan has embarked upon an additional wilful violation of the federal securities laws and that is with respect to Rule 15 C2-11. The rule, in brief, requires that under certain circumstances where a security has not been listed or bids or quotations haven't been entered or failed to have been entered over a given period of time, certain information need be provided before such a quotation is listed in the pink sheets. Mr. Sloan has wilfully violated this rules. He makes no bones about it.

It is his contention that he intended to violate this rule; he has stated it to Commission staff members. I believe he stated it on the record at the time that the Commission was seeking a temporary restraining order.

To this end Mr. Sloan has submitted hundreds of Forms 211, which is the form which must be submitted to the National Quotation Bureau which is the publisher of the pink sheets, a media for the quotation of over-the-counter securities. These Form 211's are absent any information

necessary to comply with the rule. Mr. Sloan instead marks each form on the back with respect to information which is to be provided; Mr. Sloan indicates either that he doesn't know the information, he doesn't have the information, or just plain n-o, no.

As of this date, Mr. Sloan has published in excess of 250 quotations in the pink sheets and, in fact, will continue to do the same unless he is enjoined by this Court.

Moreover, I feel that it's important to point out to the Court that in Mr. Sloan's absence during the original period of the temporary restraining order, Mr. Sloan, through his agent, a gentleman by the name of Henry Landson attempted to list with the National Quotation Bureau additional securities, this clearly in contravention of the temporary restraining order which this Court entered on December 30th.

In addition, Mr. Sloan represented to this Court on December 30th at the time of the temporary restraining order that there would be no individual available or no individual at his residence to make his books and records available for inspection.

Your Honor, this was not the case. This was not the truth. Mr. Landson was at 1761 Eastburn Avenue. He was answering the phone, "Sloan & Company." The Commission was advised that he had called the National Quotation Bureau and attempted to submit bids in securities in violation of not only 15 C2-11 but, more significantly, the Court order.

Clearly, your Honor, if there is not an injunction entered against Mr. Sloan at this point, he will continue with his wilful conduct and continue to violate Rule 15 C2-11 as well as continue to deny the Commission access to his books and records, as well as examine them.

Your Honor, the Commission believes that the entrance of an injunction is in the public interest and that a showing

of additional violations has been made quite clearly. In fact, the need for the injunction is even more clearcut in light of the fact that Mr. Sloan appears not to even have complied with your temporary restraining order.

Better evidence of a need for injunction, I don't think we could put forth. It appears that Mr. Sloan will go about and conduct his business as he sees fit with total impugnity to the federal security laws as well as Court orders.

Wherefore we ask the issuance of an order of injunction by this Court against Samuel H. Sloan individually and doing business as Samuel H. Sloan & Company.

THE COURT: And that would be in the form of a temporary restraining order, that is, so far as the injunctive provisions are concerned. You would seek an injunction relative to the bookkeeping portion, the institution of quotes regarding over-the-counter securities, and what else?

MR. SELVERS: Your Honor, we would additionally seek the mandatory order to compel Mr. Sloan to allow the Commission access to his books and records. Mr. Nortman in particular attempted to make an arrangement on December 30th, in an attempt to examine Mr. Sloan's books and records. We were, of course, unequivocally denied such access. We have been unable during the interim and during the time that the temporary restraining order has been in existence to examine Mr. Sloan's books and records.

He takes the position, again, as the Court has stated, not only to his books and records at 1761 Eastburn Avenue, but in an additional private avenue in Lynchburg, Virginia, as well as his listed office residence of 120 Broadway, New York, New York.

In sum, your Honor, that is the scope of the injunction that we would be seeking, coupled with the mandatory order regarding books and records, as well as ordering Mr.

Sloan not to remove, destroy or alter any of his present books and records.

THE COURT: Thank you, Mr. Selvers.

Mr. Sloan?

MR. SLOAN: Am I to understand the Commission has rested its case at this point?

THE COURT: They have made their case and you may now proceed.

MR. SLOAN: Your Honor, my understanding today was that there was supposed to be an evidentiary hearing.

THE COURT: You may produce any witnesses you want. I told you that, and I understood you were going to produce one witness. You may proceed.

—MR. SLOAN: Your Honor, I spoke to the Securities and Exchange Commission within the last couple of days asking them if they intended to introduce witnesses to testify. Mr. Nortman told me that the earliest possibility I would find out who they intended to call or what evidence they intended to offer would be today at 3:15.

Now, my understanding —

THE COURT: Do you wish to present any witnesses? They have decided to rest on the record as it now exists, and that is for better or for worse.

If you wish to present witnesses, I will permit you to do so, as I told you.

MR. SLOAN: Your Honor, at this point I wish to proceed as though this were a trial. I would wish to make a motion to dismiss the complaint on the ground that no evidence has been offered in support—no competent evidence has been introduced in support of an injunction.

You can't cross-examine an affidavit, so in a hearing of this sort, an affidavit does not constitute evidence.

I would like to cross-examine the individuals who signed these affidavits that have been presented to the Court, but, of course, it's the Commission's job to call them as witnesses. It's not my job to make their case, and at this point I feel it's appropriate to make a motion to 'dismiss.

THE COURT: Your motion is denied.

You may proceed.

MR. SLOAN: Next, I have a number of motions I wish to make. Some of these motions have previously been made in one form or another, but so the record will be clear on everything, I want to include them in the record.

First, your Honor, I am asking that you recuse yourself on three grounds: First, on the grounds of bias and prejudice; secondly, on the grounds that inasmuch as you heard a previous case in which the Securities and Exchange Commission was the plaintiff and I was the defendant that you should not hear this case.

My understanding is that the rule is in criminal proceedings that if a judge has sat on a case involving a criminal action, that if the same defendant comes up in another case, that the same judge doesn't under normal circumstances hear that case.

THE COURT: I have had occasion to hear such cases and I don't know that there is any firm rule on that subject.

MR. SLOAN: The third ground for asking you to recuse yourself from this case is that the case is not properly assigned to you on the designation form. The Commission filled out this form and under pending related cases, they had 1971 case which is now on appeal to the U.S. Court of Appeals, but it's not a pending case before this Court, and therefore, the designation form was improper and you are not properly assigned to this case, because cases are supposed to be assigned by lot, and the Commission feels since they feel they got a favorable decision from you last

time, they have a better chance of getting a favorable decision from you this time, rather than a judge assigned in the normal manner.

THE COURT: Am I correct that you presented all these grounds to the United States Court of Appeals for the Second Circuit in your petition for writ of mandamus?

MR. SLOAN: Yes, your Honor.

THE COURT: Am I also correct—it is my understanding, I haven't actually seen anything on paper, but it's my understanding that your petition for a writ of mandamus was denied?

MR. SLOAN: That is correct, but it's also correct even though my petition for a writ of mandamus was denied, I could also raise these same grounds on appeal from this preliminary injunction and, therefore, I don't believe that a dispositive decision has been made with regard to these particular points.

THE COURT: You have chosen to move orally to disqualify the Court. I have never been presented with affidavits by you. You seek to disqualify the Court by certain oral statements which you have made.

I would suggest that the law in this Circuit with respect to disqualification was set forth by Judge Mansfield in Hodgson v. Liquor Salesman's Union Local No. 2 of the State of New York, 444 F.2d 1344, at 1348. Judge Mansfield stated the law of this Circuit with respect to disqualification, as follows:

"Turning to the first of these contentions, Section 144 provides that 'whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice, either against him or in favor of any adverse party, such judge shall proceed no further therein.' In order to guard against frivolous attacks, it further specifies that the affidavit 'shall state the

facts and the reasons for the belief that bias or prejudice exists.' Since the purpose of the section is to avoid the appearance as well as the actual existence of bias or prejudice on the part of the trial judge, the facts stated in the affidavit as the basis for the belief that bias or prejudice exists must be accepted as true by the judge, even though he or she knows the statements to be false. Burger v. United States, 255 U.S. 222, 41 Supreme Court 230, 65 Lawyers Edition 481 (1931); Rosen v. Sugarman, 357 F.2d 794 (Second Circuit 1966); Cora v. Hoffman, 212 F.2d 211 (Seventh Circuit 1954).

"However, the trial judge must at the outset determine whether the facts so stated would constitute legally sufficient grounds for recusal. Burger v. United States, supra; Simmons v. United States, 302 F.2d 71, 75 (Third Circuit 1952); Albert v. United States District Court (Sixth Circuit 1960). And if the affidavist is insufficient, he is under just as much of a duty to deny the application as he would be to recuse himself if it were sufficient. Rosen v. Sugarman, supra, 357 F.2d at 799; Henry Union Leader Corp., 292 F.2d 381, at 391 (First Circuit), certiorari denied 368 U.S. 927, 82 Supreme Court 361, 7 Lawyers Edition Section 190 (1961).

"Mere conclusions, opinions, rumors or vague gossip are insufficient. Burger v. United States, supra, 255 U.S. at 34, 41 Supreme Court 230; Simmons v. United States, supra, 302 F.2d at 75.

"To be sufficient, the affidavit must set forth facts including the time, place, persons and circumstances and where based upon an extrajudicial statement of the judge, the substance of that statement. Burger v. United States, supra, 255 U.S. at 34, 41 Supreme Court 230; Wapnick v. United States, 311 F.Sup. 183, 184-185 (Eastern District of New York 1969)."

I find that there has been no affidavit submitted here

and I find the statements which have been made not to be a proper substitute for an affidavit. Nothing said by the defendant in any way shows any personal bias or prejudice on the part of this Court, either against Mr. Sloan or in favor of any adverse party.

The word "personal" has been said to be in contrast to "judicial." The Supreme Court has said, "The alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." U.S. v. Grinell Corporation, 384 U.S. 563, 583, 86 Supreme Court 1698, 1710, 16 Lawyers Edition 2nd 778 (1966).

In addition, Mr. Sloan has indicated that this Court should and must recuse itself because in some way or manner the case here was illegally assigned to the Court. Since such a matter involves the assignment committee, I would note for the record that I took the matter of my being assigned to this case up with the assignment committee, and after the assignment committee met the assignment committee indicated to me through the Chief Judge that this case should remain with me unless I felt I was biased or prejudiced in some way against Mr. Sloan.

As I indicated to him previously, this was on December 30, 1974, I do not consider that I am biased or prejudiced personally against Mr. Sloan. Furthermore, I would note that the rules to which reference has here been made, our internal rules governing the business of the District, is designed for the fair treatment of the judges of the district. See 28 U.S. Code, Section 137. And I would suggest that Mr. Sloan has no standing to raise any questions concerning the manner in which the internal rules governing the division of the business of this court are applied.

For this Court to have accepted the assignment of this case does not, as a matter of law, demonstrate bias or prejudice under 28 U.S.C., Section 144.

I would further note that the affiant, that is, that Mr. Sloan has chosen to bring a petition of mandamus against myself as well as against Judge Griesa, and that this petition has been denied by the Court of Appeals.

In view of the inadequacy of the presentation made by the defendant here, his application that this Court recuse itself is in all respects denied.

MR. SLOAN: Your Honor, it is correct to state that one of my defenses to this motion is on the grounds of the unconstitutionality of the statute.

THE COURT: Isn't that your only defense, Mr. Sloan?

MR. SLOAN: No, your Honor, it is not.

THE COURT: Are you telling me that you are ready, willing and able to submit your records to the inspection of the Securities and Exchange Commission? Are you telling me that?

MR. SLOAN: No, I am not, your Honor.

THE COURT: Is there any reason other than your cliam that the statute is unconstitutional for your refusal to permit access and examination of your books and records?

MR. SLOAN: I also claim that the rules that are referred to are an improper exercise of the Commission rule-making authority.

THE COURT: Do you make any other claim, sir?

MR. SLOAN: Well, your Honor, I would like to state that there are rules of evidence which this Court must adhere to in making any finding of fact and —

THE COURT: What rule of evidence do you make reference to, sir?

MR. SLOAN: The rule on hearsay evidence, for example. Most of the statements which are made in the affidavit are based on hearsay.

For example, the Commission says that we received forms from the National Quotation Bureau or we received information from the National Quotation Bureau or that we spoke to Mr. So-and-So on the telephone. Almost the entire basis of the Commission's case in the affidavits presented to this Court are what would be called hearsay evidence, is not competent evidence.

THE COURT: Do you wish to take the stand and swear under oath that you have placed no quotes with the National Quotation Bureau in the last thirty days?

MR. SLOAN: No, I do not.

THE COURT: You did, in fact, place such quotes but you say you are entitled to; isn't that the point?

MR. SLOAN: That is correct, your Honor.

THE COURT: Very well. You may continue with any other presentation you wish to make.

MR. SLOAN: Your Honor, I also ask that the Court, that this case be decided by a three-judge Court pursuant to Section 28 U.S.C. 2282 and 2284, on the grounds that as an affirmative defense I am seeking to enjoin the enforcement of Rule 15 C2-11, Rule 17A3 and 4, and 17A, and Section 15C2 of the Securities Exchange Act of 1934, and I am requesting that you ask the Chief Judge of the Court of Appeals to convene a Chief Judge Court to hear my motion for a preliminary injunction.

THE COURT: As you know, it's up to the since judge to determine in the first instance whether there has been sufficient presented to cause that request to be made. You realize that, do you not?

MR. SLOAN: I think the case is Coosby v. Osser, in which it was stated that there should be a showing that there was — I believe the word "substantial" was used — constitutional question.

THE COURT: Yes, and that it not be frivolous.

What else do you have, sir?

MR. SLOAN: Your Honor, I wish to move to dismiss. I would like to make these motions on paper, but due to the shortness of time in this hearing for a preliminary injunction —

THE COURT: You have had since December 30th. This is now January 17th and the matter was extended once by Judge Griesa for a period of nine days from the 8th to the 17th.

It seems to me the shortness of time, despite your trip to Iceland, you have been back here for approximately ten days, if I recall correctly, and it would seem to me that argument that you did not have to make up your papers falls on somewhat deaf ears, in view of the 18-page presentation that you made to the Court of Appeals. It seems to me you have had time to do that, and I would expect that you should want to present your position on paper.

If you have not done so at this time, I am prepared to extend the temporary restraining order upon your application so you may submit papers within some period of time. If you do not wish me to extend the temporary restraining order to permit you to submit papers, I would suggest that I may have very little alternative today.

What is your application?

MR. SLOAN: Your Honor, the time to answer the complaint has not yet run. I have twenty days to answer and the twenty days is not yet up.

THE COURT: But today is the return date, once adjourned, of the motion for a preliminary injunction, and it would seem to this Court that the time has come for you to do more than just stand here and make statements not under oath, and it seems at this point that if you wish to make opposition to the presently filed papers, that you do so by affidavit.

I am prepared to permit you to file affidavits in opposition to the Commission's position if you wish, but it would seem to me that if you do wish that, it would be necessary for me to continue the temporary restraining order which I issued and as to which I have heard nothing which would cause me to believe that that that sould be vacated at this point.

What is your request?

MR. SLOAN: Your Honor, I am not requesting anything at this point.

THE COURT: I will deal with the matter, then, as I deem appropriate after you have finished.

MR. SLOAN: I want to make an oral motion to dismiss the complaint for failure to state a claim under Rule 9 B of the Federal Rules of Civil Procedure, which states that a complaint must set forth the circumstances constituting fraud with particularity. The complaint submitted by the Securities and Exchange Commission is the standard SEC complaint. They file complaints like this in court every single day of the week. They have an enormous number of actions pending before the United States District Courts in various parts of the United States. All complaints read exactly the same.

It's impossible for a defendant to come into court and defend against these massive complaints that the SEC submits without knowing exactly what they are being charged with, and on this ground — I note in one case I referred to in my petition for a writ of mandamus, Judge Pollack required the Securities and Exchange Commission to replead the complaint with particularity so the defendants are able to frame a response and know what they are being sued for.

On this ground, I move to dismiss the complaint.

Secondly, I wish to move to dismiss on the grounds that the complaint fails to join a necessary party in the National

Quotation Bureau. It's obvious in this case the National Quotation Bureau is a central party to the complaint and, as a matter of fact, by not joining the National Quotation Bureau, I have been subjected to substantial prejudice because the Securities and Exchange Commission has, I understand, called the National Quotation Bureau on the telephone, spoken to officers, spoken to their attorneys, and in an attempt to keep them from listing securities in the pink sheets under my name, and since I can't bring them here today — they are not part of this case — I feel that I am suffering from substantial prejudice because they have a direct interest in this proceed—ing, and it's very difficult for me to defend without them being joined, and I am moving to dismiss on that ground.

Thirdly, I move to dismiss on the grounds of res judicata in that the Securities Exchange Commission has already obtained an injunction which enjoins me from violation of Rule 17A4. They are seeking to obtain a second injunction with respect to exactly the same section. The language is precisely the same as the old injunction, and on this ground I feel that that part of the complaint should be dismissed.

Fourthly, I move to dismiss on the grounds that the Court lacks subject matter jurisdiction because no showing has been made that any means or instrumentality of interstate commerce was involved in the transactions in question or in the so-called violations of federal securities laws that the Commission keeps referring to.

They made no attempt to show there is interstate commerce involved. As a matter of fact, there has not been interstate commerce involved in these particular transactions.

The fifth grounds for moving to dismiss is that the Securities and Exchange Commission lacks standing to sue. The standing to sue is conferred exclusively upon the executive branch of the United States Government.

Lawsuits brought by the United States are always brought by the United States Attorney's Office. There is nothing in the Constitution of the United States that states that any independent agency has the authority to institute suit and in fact —

THE COURT: Well, the other day I had a proceeding where the Department of Labor represented by its regional solicitor was suing here on behalf of the Secretary. I find that no different than the situation of the SEC by its counsel suing in this court.

You may proceed.

MR. SLOAN: I would like to point the Department of Labor is a part of the executive branch of the Government of the United States.

z cou parTHE COURT: What part of the Government of the United States is the Securities and Exchange Commission? It certainly is not either a part of the legislative or judicial branch, and there is only one left.

MR. SLOAN: It's not part of the executive branch.

THE COURT: What is it? It's an administrative agency which is a part of the executive branch or arm of the Government of the United States.

MR. SLOAN: My understanding is that the Securities and Exchange Commission is entirely independent of the executive branch of the Government of the United States, other than the fact that the Commissioners themselves are appointed by the President with the approval of Congress, and I would like to hear from the Commission on that if they disagree with that interpretation.

The Attorney General, for example, cannot order the Securities and Exchange Commission to do anything, or the Commissioners themselves to do anything.

THE COURT: I am not sure that the Attorney General can order branches of the executive arm of the Government

to do anything. I don't know that he can order the Secretary of State around or the Secretary of the Treasury, but I am not going to get into that.

I deem the Securities and Exchange Commission to be a part of the executive branch of the United States Government, albeit an independent regulatory agency.

MR. SLOAN: I think the position of the Securities and Exchange Commission itself is different from that. I think they take the position they are independent from any branch of the Government as defined by the Constitution.

The next ground for moving to dismiss, your Honor, and if the motion to dismiss is denied, I intend to show this through the testimony of witnesses —

THE COURT: I hope you have them here.

MR. SLOAN: I think the two witnesses I intend to call are right back in the room.

THE COURT: Do you have them under subpoena?

MR. SLOAN: No.

THE COURT: They may not be in the back of the room when you finish.

Would you name them?

MR. SLOAN: Thomas Dolan and Ira Spindler and Jerome Selvers. These are the three witnesses I intend to call, but first I am making my motion to dismiss on the grounds just stated. They failed to join a necessary party and res judicata and lack of subject matter jurisdiction.

THE COURT: What happened to the lack of standing to sue?

MR. SLOAN: And lack of standing to sue because the Commission is not part of the executive branch of the Government.

THE COURT: Do you have any other motions?

MR. SLOAN: No, your Honor, except my motion which I don't believe has been decided yet is that I am requesting a three-judge Court and that this case be transferred to Judge Griesa because he has before him a case with a lower designated docket number.

THE COURT: Lower than 71 Civil number which you adverted to in your papers before?

MR. SLOAN: Judge Griesa's case is 74 Civil 2792. It's not lower than the 71 number but it's lower than the number on this case currently before this Court, and the 71 case is not pending before this Court and therefore I feel it's proper to transfer that case to Judge Griesa.

THE COURT: I would suggest that the 1971 case involves a permanent injunction which is very much before this Court. I will say no more than that. A permanent injunction is a continuing thing. Contempt proceedings may be instituted under it, and other activities may be instituted under it. It's not a final judgment which has been paid and satisfied and done with.

What other motions do you have, sir?

MR. SLOAN: That is it.

I would like to point out one thing. I made a motion for a three-judge Court in the 71 case and was denied on the grounds that this Court has no jurisdiction because the case is presently on appeal to the United States Court of Appeals. Therefore, I would say that the 1971 case — the decisions of this Court must be consistent if this Court has no jurisdiction to decide a case because it's on appeal, it also has no jurisdiction to proceed on the basis of a permanent injunction.

THE COURT: Anything els, Mr. Sloan?

MR. SLOAN: No, your Honor.

THE COURT: Does the Commission wish to make any statement in reply?

MR. NORTMAN: Very brief, your Honor. I do not believe we really have to respond to any of the motions that the defendant has made.

I would like to just state, for purposes of the record, though, because, frankly, a lot of conversations have a way of becoming distorted, and I am certain that the Court of Appeals may review this decision as well.

With respect to Mr. Sloan's assertion based on a conversation he had with me concerning what witnesses, if any, we would be calling, I just indicated to Mr. Sloan who walked into the office at 5:30 at the close of business — I believe it was on Wednesday — while I was in the middle of a conference, that he wanted to know what witnesses we were calling, and he wanted to have a list of all our exhibits and copies of them, because if we are having a hearing, he is entitled to them, and in no uncertain terms.

I indicated to Mr. Sloan that I thought it would be highly unlikely there would be a need for an evidentiary hearing in light of the fact that no affidavits have been filed, and for the purposes of the record on the motion now before the Court facts are not in controversy. I did not elaborate on that point; I don't think it needs any.

With respect to the possibility of calling witnesses, I did indicate that the issues in a rather brief complaint and in the affidavits that were filed are rather clearcut; that if witnesses were to be called based on the issues raised in this lawsuit and this lawsuit alone, that they would most likely be the two gentlemen who are sitting in the back. I would just like that clear for the record.

I believe that the record of the Commission in this case shows that we bent over backwards to be more than courteous to Mr. Sloan, as has this Court.

THE COURT: The motions made by Mr. Sloan for the transfer of this case to Judge Griesa, for the convening of a three-judge Court, to dismiss the complaint for failure to

plead fraud with particularity, for failure to join a necessary party, on the ground of res judicata, on the ground of lack of subject matter jurisdiction, and on the ground of lack of standing to sue, are in all respects denied.

You may proceed, Mr. Sloan.

MR. SLOAN: The first witness I wish to call is Ira Spindler.

MR. NORTMAN: Your Honor, before Mr. Sloan proceeds —

THE COURT: Let's get Mr. Spindler sworn because then I want to hear an offer of proof from Mr. Sloan. I presume that is what you had in mind?

MR. NORTMAN: Yes.

THE COURT: Since Mr. Sloan has conceded all of the relevant facts, I want to know what he intends to prove.

IRA B. SPINDLER, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Mr. Sloan, I will now hear you.

MR. SLOAN: Your Honor, I find this most objectionable. I had not conceded anything. As far as I am concerned, the Court has nothing before it except for a few affidavits and there has been no opportunity to cross-examine an affidavit and, therefore, there is nothing before this Court, and I haven't conceded anything.

Secondly, I see no reason why I should make an offer of proof to cross-examine an individual on whose affidavit the request for preliminary injunction is based. There are three affidavits in this case, one by Ira Spindler, one by Jerome Selvers and Thomas Dolan, and I find it most objectionable that I would be asked to make an offer of proof on my attempt to cross-examine a witness whose testimony the Commission itself has brought to the attention of this Court.

THE COURT: I will let you proceed with your questions, and I note from your statement that you intend to cross-examine Mr. Spindler on the affidavit which he presented to this Court.

I have that affidavit before me, and I will permit you to cross-examine regarding the subject matter thereof.

You may proceed.

MR. SLOAN: Your Honor, again I object.

THE COURT: Ask your questions.

MR. SLOAN: Your Honor —

THE COURT: Ask your questions, sir.

******

APPENDIX P

ORAL DECISION OF JANUARY 17, 1975.

*****

THE COURT: Thank you.

Mr. Sloan, you indicate to the court that you do not wish the decision to be a hasty one and yet when you were on the stand you indicated that you would not consent to the extension of a temporary restraining order beyond today. Is that still your position?

MR. SLOAN: Your Honor, the reason why I have taken the position I have —

THE COURT: Just answer the question.

MR. SLOAN: Yes, your Honor.

THE COURT: The courhut is prepared to render a decision: The court having held a hearing on the plaintiff's motion for a preliminary injunction on January 17, 1975, at which the court considered the moving papers of the plaintiff including the affidavits of Thomas F. Dolan and Ira B. Spindler of the Securities and Exchange Commission and at which the court heard the testimony of Ira B. Spindler, a financial analyst in the New York office of the Securities Exchange Commission who testified that on December 18, 1974, Samuel H. Sloan "Sloan" stated to him that he intended to wilfully violate Rule 15c2-11, testimony which this court credits, and the court also having heard the testimony of Sloan who did not contest the factual allegations presented by the Commission as set forth in the affidavits of Messrs. Dolan and Spindler, the court finds that the defendants will, unless restrained, continue to engage in acts and practices which constitute violations of Sections 15C2 and 17A of the Securities Exchange Act of 1934 as amended. 15 USC 780A and Rules 15C2-11 and 17A-4 promulgated thereunder 17 CFR

240.15C2-11 and 240.17A4 and that immediate and irreparable injury, loss and damage will result unless a preliminary injunction is issued enjoining the defendants from violating the bookkeeping provisions of the aforementioned statutes and regulations and from instituting quotes in over-the-counter securities and requiring the defendant to give access to his books and records to duly authorized representatives of the Commission so that they may examine these books and records as provided for in the foregoing statutes and regulations.

Sloan's only defense is that the foregoing statutes and regulations are so vague as to be unconstitutional.

The defendants have provided no legal arguments to support their contention. The court finds that plaintiff has presented a prima facie case that the statutes and regulations comport with the requirements of the Constitution. See Securities and Exchange Commission v. Boren, 286 F.2d 312 (2d Cir. 1960); Securities and Exchange Commission v. Broadwall Securities, Inc., 240 F. Supp. 962 (SDNY 1965).

Based upon the facts presented on the issue of noncompliance with the foregoing statutes and rules, the court is satisfied that the protection of the investing public requires the granting of the application for a preliminary injunction. See Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959).

Submit order in accordance with the foregoing decision.

MR. NORTMAN: Your Honor, we have in our possession, we have handed up to the bench, an order of injunction. We were optimistic your Honor would so rule and we are glad to see our expectations have been fulfilled.

THE COURT: You have handed up to me an order of injunction. I find that it comports with the decision which has been rendered and I sign the dating January 17, 1975, issued at 6 P.M.

I have just signed the preliminary injunction. I direct counsel to hand a copy thereof to Mr. Sloan and since the Clerk's office is closed, I direct the Clerk to file this preliminary injunction on Monday.

The purpose for which court has convened, court is adjourned.

MR. NORTMAN: Your Honor, may I just on the record reflect that I am handing Mr. Sloan a carbon copy as conformed to your Honor's directions to Mr. Sloan in open court.

MR. SLOAN: Your Honor, this is not a conformed copy, I would like to point out.

THE COURT: Let me see it.

(Pause)

I have just examined the copy of a preliminary injunction which has been handed up to me by Mr. Nortman and I would state that it is a conformed copy of the preliminary injunction signed by the court except for the attachments which are annexed, Mr. Nortman. The attachment to the injunction consists of seven pages. The attachment — I am sorry, yours are printed on both sides. It also consists of seven pages. I just noticed that. They are identical, Mr. Nortman.

Would you now hand the conformed copy of the order of injunction to Mr. Sloan.

MR. SLOAN: I wish to move under Rule 8A of the Federal Rules of Civil Procedure in view of the fact that I intend to appeal immediately from the decision of this court, I ask that the injunction be stayed pending appeal and I note thar Rule 8A of the Federal Rules of Complete Procedure states that an application for a stay pending appeal must ordinarily be sought in the first instance in the District Court and for that reason, i now move for an order under this section for a stay pending appeal.

THE COURT: Motion denied.

Anything else?

MR. SLOAN: I just wish to point out in connection with a stay pending appeal, in its findings the court did not incorporate any findings of fact and it did not reach any conclusion to the effect that I used the mails or eans or instrumentalities of interstate commerce in connection with my activities and this is one of the grounds for the appeal and I also wish to ask the court to reconsider its decision based upon that.

THE COURT: To the extent it is not included by implication, I expressly incorporate into my decision a finding that you used the facilities of interstate commerce and the telephones to conduct your business.

Is there anything else, Mr. Sloan?

MR. SLOAN: I would submit that the telephones have never been held to be instrumentality of interstate commerce.

THE COURT: Anything else, Mr. Nortman?

The purpose for which court having been convened, is concluded, court is adjourned.

APPENDIX Q

ORDER OF INJUNCTION DATED JANUARY 17, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civil 5729

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and d/b/a
SAMUEL H. SLOAN & CO.
Defendants.

This matter having come on for a hearing upon an Order to Show Cause issued on December 30, 1974 by this Court and upon the Complaint in this action and the affidavits of Thomas F. Dolan and Ira B. Spindler in support of the application of the Securities and Exchange Commission for an order to show cause and temporary restraining order, mandatory orders, preliminary and permanent injunctions and after hearing counsel for the Securities and Exchange Commission in support of the motion and defendant Samuel H. Sloan, pro se in opposition thereto, and this Court having signed a Temporary Restraining Order on January 8, 1975 and it appearing that unless the defendant Samuel H. Sloan, individually and doing business as Samuel H. Sloan & Co. are preliminarily enjoined, violations by the defendants of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), as amended, 15 U.S.C. 78q(a) and Rules 15c2-11 and 17a-

4 promulgated thereunder, 17 C.F.R. 240.15c2-11 and 240.17a-4 and that immediate and irreparable loss and damage will result to members of the investing public and others, it is hereby

ORDERED, ADJUDGED AND DECREED that Samuel H. Sloan and Samuel H. Sloan & Co., their agents, servants, employees, attorneys, successors and assigns, and those persons in active concert or participation with them (or any member or dealer registered with the Commission of which defendant Samuel H. Sloan may become a principal or controlling person), be and they hereby are:

(a) Ordered to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4;

(b) Enjoined from further violations of the examination provisions of Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-4; and

(c) Ordered not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-3 and 17a-4; and

(d) Enjoined from further violations of the provisions for initiating over-the counter quotations of Section 15(c)(2) of the Exchange Act,

15 U.S.C. 78o(c)(2) and Rule 15c2-11 promulgated thereunder, 17 C.F.R. 240.15c2-11, (a full copy of the Rule is attached hereto and made a part of this Order of Injunction), while and at a time said defendants failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may lawfully publish any such quotation as required by Rule 17 C.F.R. 240.15c2-11(a)(4) and (c).

It is further ordered that this Court shall retain jurisdiction over this matter for all purposes.

Dated: New York, New York
January 17, 1975
Issued at 6 p.m.

Robert J. Ward
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED: 1-20-75
s/Raymond F. Burghardt, Clerk

APPENDIX R
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 10, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 776—September Term, 1975.

(Argued April 27, 1976 Decided May 10, 1976.)

Docket No. 75-6106

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

—against—

SAMUEL H. SLOAN, individually and d/b/a SAMUEL H. SLOAN & Co.,

Defendants-Appellants.

Before:

LUMBARD, WATERMAN and FEINBERG,

Circuit Judges.

Appeal from various orders of United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in course of suit to enjoin violations of SEC rules.

Affirmed in part, dismissed in part.

SAMUEL H. SLOAN, Pro Se, Lynchburg, Virginia, *for Defendants-Appellants.*

MICHAEL J. STEWART, Assistant General Counsel, Securities and Exchange Commission, Washington, D.C. (Thomas L. Taylor, III, Attorney, on the brief), *for Plaintiff-Appellee.*

PER CURIAM:

Samuel Sloan, a securities broker-dealer who is a frequent litigant in this court, see *Sloan* v. *SEC*, slip op. 2377, 2379 & nn. 2, 3 (2d Cir. March 4, 1976), and cases there cited, appeals from a number of orders of the United States District Court for the Southern District of New York, Robert J. Ward, *J.*, entered in the course of a continuing lawsuit in which the Securities and Exchange Commission (SEC) seeks to enjoin him from violation of various SEC rules requiring maintenance of proper books and records and making them accessible for inspection by SEC officials.[1] We affirm in part and dismiss in part.

The most significant order challenged by Sloan on this appeal, to which he devotes most of his lengthy brief, is an order dated September 3, 1975 holding him in civil contempt for failing to comply with a preliminary injunction granted by Judge Ward on January 17, 1975.[2] The injunction required Sloan, among other things, "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of [his] books and records." An appeal from this

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1 This is not the first such action taken by the SEC against Sloan. See *SEC* v. *Sloan*, 369 F. Supp. 996 (S.D.N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976).

2 The September 3 order adjudged Sloan in civil contempt and gave him 20 days to purge himself. When he did not, a further order of civil contempt was entered on September 26, 1975 ordering Sloan's arrest.

injunction was dismissed by this court on January 7, 1976. *SEC* v. *Sloan,* Dkt. No. 75-7056.[3]

The order from which Sloan now seeks to appeal is both in form and in substance an order of civil contempt. An order of civil contempt against a party to the litigation is not an appealable final order. 9 Moore, Federal Practice ¶ 110.13[4]. Moreover, after filing and briefing this appeal, Sloan purged himself of contempt, and on February 4, 1976, Judge Ward entered an order to this effect. Thus, no live controversy remains as to any of the alleged errors in the contempt adjudication, and the appeal from the order of contempt is moot.

Sloan also argues that the district court's refusal to dismiss the SEC's complaint on various grounds, and the grant to the SEC of a protective order as to certain interrogatories, were erroneous. Neither is an appealable final order. 9 Moore, Federal Practice ¶ 110.08[1] at n.33 and cases there cited: *UAW* v. *National Caucus of Labor Committees,* 525 F.2d 323, 324 (2d Cir. 1975), and cases there cited. Moreover, Sloan's notice of appeal does not refer to the protective order, dated August 4, 1975. These aspects of the appeal are therefore dismissed for lack of jurisdiction.

Another ruling appealed from is Judge Ward's refusal to hold the SEC in contempt for allegedly violating an oral order restricting the parties' press releases. Assuming that such an order is appealable at all, we note that the district judge found that the particular press release that was the subject of Sloan's motion did not violate his order. We see no basis for substituting our judgment for that of the district judge in interpreting his own order.

3 We cited *United States* v. *Sperling,* 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

We also affirm Judge Ward's refusal to disqualify and disbar counsel for the SEC. While such an order is appealable, *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 496 F.2d 800 (2d Cir. 1974) (en banc), we have held that the supervision of attorneys is a matter primarily for the district court, whose findings will be upset only on a showing of abuse of discretion. *Hull* v. *Celanese Corp.,* 513 F.2d 568, 571 (2d Cir. 1975). We see no abuse of discretion here. Sloan also argues that the SEC attorneys should be disqualified because the SEC lacks authority to prosecute actions on its own behalf, and that *SEC* v. *Robert Collier & Co.,* 76 F.2d 939 (2d Cir. 1935), which holds that it has such authority, should be overruled. We see no sufficient reason to overturn a persuasive decision by a distinguished bench.

Finally, Sloan appeals from the denial of his motion to enjoin the SEC from "harrassment and annoyance of the defendant herein." Sloan apparently would have us treat this motion as in effect a complaint or counterclaim charging violations of his constitutional rights, and seeking a preliminary injunction. On that theory, the order denying the injunction would be appealable. 28 U.S.C. § 1292(a)(1). Moreover, such a denial would have required findings of fact and conclusions of law under F.R. Civ. P. 52(a), which were not made by the district court. On the other hand, the papers do not purport to be pleadings, and in the circumstances of this litigation, the district judge apparently considered the motion as one addressed to "the district court's power to control the proceedings before it," 9 Moore, Federal Practice ¶ 110.19[1] at 207-08, and thus not a request for an injunction governed by the Rule and statute cited above. We agree that the motion here was more in the nature of a request for a protective order.

The order denying it is therefore interlocutory and non-appealable.

Accordingly, as indicated above, the appeal is dismissed as to certain of the rulings appealed from; in all other respects, the rulings of the district court are affirmed.

APPENDIX S

DISTRICT COURT OPINION DATED AUGUST 18, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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74 Civ. 5729 — R.J.W.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

-against-

SAMUEL H. SLOAN, Individually and
d/b/a SAMUEL H. SLOAN & CO.,
Defendants.

Plaintiff Securities and Exchange Commission ("the Commission") moves pursuant to Rule 56, Fed. R. Civ. P., for summary judgment permanently enjoining defendants from further violations of Sections 15(c)(2) and 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§80o(c)(2) and 78q(a) ("the Exchange Act"), and Rules 15c2-11 ("Initiating Quotations in Over-the-Counter Securities") and 17a-4 ("Examination and Visitation Provisions") promulgated thereunder, 17 C.F.R. §§240.15c2-11 and 240.17a-4. For the reasons hereinafter stated, the motion is denied and the complaint is dismissed as moot.

From May 10, 1970 to April 28, 1975 Samuel H. Sloan ("Sloan") was the sole proprietor and manager of Samuel H. Sloan & Co. ("the Company"), a broker-dealer registered with the Commission pursuant to the provisions of §15(b) of the Exchange Act, 15 U.S.C. §78o(b).

Violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-11 promulgated thereunder.[1]

During the period from on or about December 18, 1974 to on or about March 7, 1975, defendants submitted numerous applications ("Forms 211") to the National Quotation Bureau, Inc. ("NQB") for publication of the quotations contained therein in the NQB's "pink sheets," a medium used by brokers and dealers to quote the shares of various companies which are traded in the over-the-counter market.

The Forms 211 submitted by defendants to the NQB did not include most of the information required by Rule 15c2-11 to be possessed by brokers-dealers submitting such applications.

During the hearing on the Commission's motion for a preliminary injunction and for an order permitting examination of the Company's books and records, defendants did not contend that the Company possessed the requisite information but rather that Section 15(c)(2) of the Exchange Act was unconstitutional and the regulations were in excess of the Commission's authority. On February 4, 1976, following the issuance of an order permitting an examination of the Company's books and records, representatives of the Commission conducted an examination and ascertained that defendants did not possess any post-1973 reports or prospectuses for those companies with respect to whose shares they had submitted Forms 211 to the NQB for the publication of quotations in the pink sheets during 1974 and 1975. Although the Commission investigators counted approximately fifty boxes and filing cabinet drawers which contained various broker-dealer books and records covering the years 1971, 1972 and 1973, there were no records for the years 1974 and 1975, a circumstance which supports the conclusion that defendants violated the foregoing section and rule.

Violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[2]

All brokers and dealers registered with the Commission are subject to the examination provisions contained in former Section 17(a) of the Exchange Act. Section 17(a), now Section 17(a)(1), and Rule 17a-4 promulgated thereunder, require broker-dealers to make, keep, and preserve books and records and authorize the Commission to inspect a broker-dealer's books and records.

In its complaint the Commission alleges that during the period from on or about December 26, 1974 to the date of the complaint, December 30, 1974, defendants violated Section 17(a) of the Exchange Act and Rule 17a-4 in that they "refused to produce for examination and maintain in an easily accessible place their books and records."

Defendants do not raise any factual issues regarding the alleged violations. Instead they contend that the statute is unconstitutional and the rules promulgated thereunder are in excess of the Commission's authority. However, the Court of Appeals recently rejected defendants' contentions. *Sloan v. SEC,* slip op. 2377, at 2380 (2d Cir. Mar. 4, 1976).

Thus, summary judgment would be appropriate and would have been granted plaintiff but for two events which occurred subsequent to the time the complaint was filed and, in this Court's view, have mooted this action. First, on April 28, 1975, the registration of the Company was revoked by the Commission and Sloan was barred from association with any broker or dealer. *Samuel H. Sloan,* Securities Exchange Act Release No. 11376 (Apr. 28, 1975), appeal pending, *Sloan v. SEC,* Dkt. No. 75-4087 (2d Cir.) motion for a stay pending appeal denied (2d Cir. Feb. 13, 1976). Second, as noted above, on February 4, 1976 the Commission examined the Company's books and records for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975.

Moreover, in *SEC v. Sloan,* 369 F.Supp. 996 (S.D.N.Y. 1974), appeal dismissed, Dkt. No. 74-1436 (2d Cir. Jan. 7, 1976), defendants were permanently enjoined from further violations of Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.[3]

As the Supreme Court noted in *Steffel v. Thompson,* 415 U.S. 452, 459 n.10 (1974):

> The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *See, e.g., Roe v. Wade,* 410 U.S. [113] 125 [)1973)]; *SEC v. Medical Comm. for Human Rights,* 404 U.S. 403 (1972); *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950).

It might be argued that there is a continuing necessity for injunctive relief here since there is a reasonable expectation of future violations by the defendants. *SEC v. Management Dynamics, Inc.,* 515 F.2d 801 (2d Cir. 1975). However, since the registration of the Company has been revoked and Sloan has been barred from association with any broker or dealer, adequate remedies are available should either of the defendants engage in future violations.

Accordingly, plaintiff's motion for summary judgment is denied and the complaint is dismissed as moot. The dismissal is without costs.[4]

It is so ordered.

Dated: August 18, 1976

s/Robert J. Ward
U.S.D.J.

NOTES

1. At the time this action was commenced, Section 15(c)(2) provided as follows:

> No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

Rule 15c2-11 requires that a broker-dealer which publishes a quotation for a security or which, directly or indirectly, submits any such quotation for publication in any quotation medium, either (a) have in his records the most recent annual report of the issuer of such security filed pursuant to Section 13 or 15(d) of the Exchange Act, Rule 15c2-11(a)(3)(iii), or (b) have in his records certain information about the issuer of such security as prescribed by Rule 15c2-11(a)(4).

2. At the time this action was commenced, Section 17(a) provided in pertinent part:

> (1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association,

registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

Rule 17a-4 requires that a broker-dealer maintain and preserve certain specified records for periods up to six years. The rule further provides that if a person ceases to be registered, "such person shall, for the remainder of the periods of time specified in this section, continue to preserve the records which he theretofore preserved pursuant to this section."

3. This permanent injunction remains in force and is unaffected by the dismissal of this action.

4. Inasmuch as this determination is not on the merits, the dismissal of this action shall not serve as a bar should a need for relief arise hereafter.

APPENDIX T

NOTICE OF MOTION TO REINSTATE THREE DISMISSED APPEALS AND AFFIDAVIT IN SUPPORT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1436 — 75-7046 — 75-7056

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-appellee,

-against-

SAMUEL H. SLOAN, et al
Defendants-appellants

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 6th day of February, 1976 the undersigned hereby moves this court for an order reinstating appeals numbered 74-1436, 75-7046 and 75-7056 and an order setting these appeals down for oral argument.

Yours, etc.,

s/Samuel H. Sloan

SAMUEL H. SLOAN
1761 Eastburn Ave., Apt. A5
Bronx, New York. 10457
appellant pro se

Dated: February 6, 1976

TO:
Thomas L. Taylor III
Securities and Exchange Commission
500 N. Capitol St.
Washington, D.C. 20549

Diamond and Golomb
99 Park Ave.
New York, New York

Moses Krislov
Engineering Building
Cleveland, Ohio

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1436 — 75-7046 — 75-7056

SECURITIES & EXCHANGE COMMISSION
Plaintiff-appellee

-against-

SAMUEL H. SLOAN, et al
Defendants-appellants

AFFIDAVIT IN SUPPORT OF MOTION

State of New York

County of New York

Samuel H. Sloan, being duly sworn deposes and says:

1. I make this affidavit in support of a motion for an order reinstating appeals numbered 74-1436, 75-7046 and 75-7056. I regret that I am making this motion in great haste without briefing or researching the issues as thoroughly as I would like. However, I believe that it is important that I proceed expeditiously considering the circumstances of this motion.

2. On the evening of February 2, 1976 at 9:30 A.M. I appeared in the courtroom of the Honorable Robert J. Ward at Room 2804 of the U.S. Courthouse Foley Square, New York, N.Y. Neither the S.E.C. nor anyone else other than Judge Ward and his clerks and secretary were present and the S.E.C. did not arrive for approximately one hour. Following the arrival of the S.E.C. a hearing was held at which time an S.E.C. staff attorney and myself both testified. A transcript of this hearing has been ordered by

the S.E.C. and I will endeavor to file a copy of it with this court as soon as it has been prepared. This hearing lasted until the afternoon of that day except for a period during which Judge Ward permitted mt to proceed to the 17th floor of the U.S.Courthouse to argue my appeal in the case of *Sloan vs. Canadian Javelin, Ltd.* 75-7096. At the conclusion of this hearing Judge Ward read findings of fact and conclusions of law into the record and then remanded me to the custody of the United States Marshal. I was held at the Metropolitan Correctional Center until February 4, 1976 at which time I was returned to Judge Ward's Courtroom where I was released following a statement by Judge Ward that I had "purged" myself of my "contempt".

3. I now move to have appeals numbered 74-1436, 75-7046 and 75-7056 reinstated. The circumstances of this motion, other than what is already a matter of record, is that on January 5, 1976 and again on January 6, 1976 I called long distance from Iceland to the office of the clerk of the U.S. Court of Appeals, spoke to MR. JOHN BRASCIA, and inquired as to whether I should attend or would be required to attend the oral argument of appeals numbered 74-1436, 75-7046 and 75-7056 which had been scheduled for January 7, 1976. During the latter of these two long distance telephone conversations I advised Mr. Brascia that I wished to submit my appeals and to waive oral argument provided that the court had no objection. I was told, as I had been told in the past, that it was not unusual for attornies to elect not to participate in oral argument and in view of my decision not attend court on January 7, 1976 my papers would be taken on submission and no prejudice would arise from my non-appearance. I also arranged to have a friend present in the U.S. Courthouse on January 7, 1976 in order to listen to oral argument. Subsequently, my friend advised me that both sides had submitted and that no oral argument had taken place.

4. I did not inquire further as to the disposition of these appeals because I assumed that the decision had been reserved and that these appeals would not be decided for some time. However, on January 27, 1976 at about 7:30 P.M. I received by special delivery mail the brief for the S.E.C, which was being filed under docket no. 75-7283. This brief argued that the latest appeal should be dismissed in accordance with the disposition of the prior three appeals on January 7, 1976. In this manner I first became aware of what the disposition of the prior three appeals had been. It appears that the Clerk of the Court of Appeals did not mail the decisions to my address in Iceland even though the docket sheet on file in the court clearly indicated what my address was nor, as far as I know, did the clerk mail these decisions to my previous address in Lynchburg, Virginia. To this day I have not seen the three decisions of this court but, during the two days in which I was confined in the Metropolitan Correctional Center, I had these decisions read to me on the telephone and I was told that they all say: "The appeal is dismissed. See *United States v. Sperling*, 506 F.2d 1323, 1345 n.45."

5. When I received the brief of the S.E.C. I resolved immediately to return to the United States and attempt to have these three appeals reinstated. Unfortunately, due to circumstances beyond my control, I was unable to return to the United States the following day and consequently I called the United States Court of Appeals to request an adjournment of the oral argument of *Sloan v. Canadian Javelin, Ltd.*, 75-7096 which had been scheduled for the following day. The following day I called again and was informed that my request had been granted and that oral argument had been adjourned until 10:30 A.M. on February 2, 1976 in accordance with an order of the court. At the same time I called Judge Ward's chambers and scheduled an appearance for 9:30 A.M. on February 2, 1976. As noted previously, I appeared in court at 9:30

A.M. on February 2, 1976 but nobody from the S.E.C. was present. After being advised by Judge Ward's secretary that the S.E.C. had been notified of this court date I moved that the action be dismissed in view of the non-appearance of the S.E.C. I also advised the Court that I had been informed that my mother had called Thomas L. Taylor III of the S.E.C. and had offered to permit the S.E.C. to examine all my financial records and that the S.E.C. had declined this offer. I urged that for this reason this action should be dismissed as moot. However, Judge Ward did not dismiss this action and instead instructed his secretary to call Mr. Moran of the S.E.C. to determine if the S.E.C. had any intention of sending a representative to court. Subsequently, the court recessed and Judge Ward thereafter announced that an attorney from the S.E.C. would be over in awhile. Ultimately an attorney did appear.

7. However, by the time an S.E.C. attorney did appear in court I was due in the Court of Appeals and accordingly I requested that Judge Ward take a recess in order to enable me to proceed to the Court of Appeals to argue my appeal. Judge Ward stated, however, that in view of the fact that I had not brought my books and records with me to the courtroom that he was going to remand me to the custody of the U.S. Marshal and the Court of Appeals had already decided that it was going to dismiss all of my appeals until such time as the S.E.C. had actually examined my books and records and I had thereby "purged" myself of my "contempt". Although I expressed strong disagreement with his interpretation of the Court of Appeals decisions, he adhered to his determination that he would not permit me to argue my appeal. Subsequently, however, the telephone rang and Judge Ward's secretary stated that Judge Mulligan wanted to speak to him. Judge Ward then retired to his robing room. Shortly thereafter he returned and subsequently he announced that his court would recess and that the U.S. Marshal, to whose custody I had by then

been remanded, would take me to the U.S. Court of Appeals so that I would be permitted to argue my appeal.

8. Based upon these facts I believe that the three appeals which have been dismissed should be reinstated. I also believe that the original decision to dismiss these appeals was erroneous. There is no explanation for this court's decision to dismiss these three appeals other than a citation to *United States v. Sperling, supra.* That was a criminal case which I believe is irrelevant to these three civil appeals. At this point I would like to say that I have not been indicted for, arrested for, or convicted of the commission of any crime nor have I escaped from prison or jumped bail. Moreover, even if it were true that I had escaped from custody and that *United States v. Sperling* was controlling the decision in that case would require that this appeal be reinstated. in that case, the defendant in question, one Garcia, had escaped from custody and the U.S. Attorney moved for a dismissal of his appeal. The motion was granted "unless counsel for Garcia notifies the clerk of the court within thirty (30) days of the date of this order that Garcia has been returned to custody".

9. As noted previously, prior to the dismissal of my three appeals I was never in custody and therefore I could not have escaped from custody. However, in any event assuming that I had escaped from custody I did in fact appear in court within 30 days after the appeal and consequently as a matter of right and in accordance with *United States v. Sperling* I am entitled to have the three appeals reinstated.

10. Although I believe that nothing more need be said on this matter I should like to say that I believe that these three appeals should not have been dismissed in the first instance. To begin with the S.E.C. never moved to dismiss and in fact expressly declined to do so. In a brief dated December 12, 1975 which the S.E.C. filed in the district court in 74 Civil 5729 which is on appeal as 75-7056, the

S.E.C. cited Supreme Court decisions of *Molinaro v. New Jersey* 396 U.S. 365 (1970) and *Estelle v. Dorrough* 420 U.S. 534 (1975) which dealt with circumstances similar to that of *United States v. Sperling, supra.* However, the S.E.C. then stated:

> "the Commission seeks not the drastic remedy of a dismissal of an appeal, but merely a restriction on the use of certain pre-trial procedures by the defendants." (Brief p. 12)

11. Thus the S.E.C. was familiar with the appropriate case law and did not move to dismiss these appeals but instead stood on the merits of the three appeals. There is no authority which permits a Court of Appeals to dismiss an appeal *sua sponte* and without notice to either side. It is true that appeals are sometimes decided on grounds not raised by either party. However, these appeals were not decided. Rather, they were dismissed. For this reason I now move to reinstate rather than move for a rehearing.

12. It can readily be observed that of the three appeals which were dismissed, two were entirely unrelated to the contempt proceeding which presumably forms the basis for the dismissal. The first appeal, filed under docket number 74-1436, was from decisions reported as 369 F.Supp. 994,996 (S.D.N.Y. 1974) where a final judgment of permanent injunction had been entered. The second appeal was from the denial of a motion to intervene, the decision of which was reported as *S.E.C. v. Canadian Javelin Ltd.*, 64 F.R.D. 648 (S.D.N.Y. 1974). These two appeals are entirely unrelated to any contempt proceeding as was the appeal of *Sloan v. Canadian Javelin Ltd.* 75-7096 which was apparently in danger of being dismissed had I not appeared in court on February 2, 1976. All three appeals in question may be had as a matter of right and, as far as I am aware, there has never occurred a dismissal of an appeal under the circumstances of these civil cases in the history of the American judicial system.

13. The single appeal which is related to the contempt proceeding was from an oral decision of the Hon. Robert J. Ward which has not been reported. The subsequent contempt proceeding itself forms the basis of an appeal which has been perfected under docket number 75-6106. That appeal is on the calendar awaiting argument. I also have other appeals pending involving the S.E.C. under docket numbers 75-7283 and 75-4087.

14. If for no other reason, the appeals in question must be reinstated because of a jurisdictional defect in their dismissal. As noted previously, the S.E.C. did not move to dismiss. Absent such a motion, the dismissal of an appeal is unconstitutional. See e.g. *Hovey v. Elliott,* 167 U.S. 409; *Hammond Packing Co. v. Arkansas* 212 U.S. 322; *Societe Internationale v. Rogers* 357 U.S. 197 (1958). Article III of the Constitution provides that the courts may decide only cases or controversies which have been presented to it and in this instance since neither side moved to dismiss this court had no jurisdiction to dismiss the appeals. Moreover, even had the S.E.C. requested a dismissal the Fifth Amendment requires that I be given notice and the opportunity for a hearing. In this case there was neither notice or a hearing. It is obvious that had I known that this court was going to dismiss my appeals if I failed to appear in court on or before January 7, 1976 that I would have appeared. In every reported criminal case in which an appeal was dismissed because the defendant escaped from custody, the defendant was given a period of time during which he could surrender and have his appeal reinstated. The first such case was *Smith v. United States* 94 U.S. 97 (1876). In that case the appeal remained on the Supreme Court calendar for six years until the U.S. Attorney finally moved to dismiss for failure to prosecute. The motion was granted without opposition and when the defendant, who was still a fugitive, moved to reinstate the appeal the Supreme Court denied the motion "unless the plaintiff in

error submit himself to the jurisdiction of the court on or before the first day of our next term." It should be noted that in a criminal case the dismissal of an appeal is not as severe as it is in a civil case because regardless of the disposition of his appeal a criminal defendant always preserves his federal habeus corpus remedies. These remedies are not, of course, available to me because I am not in jail and, as far as I know, am in no danger of being in jail.

15. The dismissal of these appeals is defective in another respect. In 1975 Congress expressed disapproval of the increasing tendency of the Courts of Appeal to dispose of cases summarily. Congress stated that it preferred instead "brief per curiam opinions" where appropriate. The decision of this court does not even qualify as a brief per curiam opinion. The decision of this court does nothing more than cite to a single criminal case which is wholly irrelevant to the complex civil litigation here. Judge Ward interpreted this court's decision when I appeared before him on February 2, 1976 as meaning that unless I furnished my books and records to the S.E.C. I would have no right to appeal to the Court of Appeals in any civil case. Although I disagree with this interpretation the fact is that this court provided no reasoning for its three decisions and therefore the decisions can be said to mean whatever one wants them to mean. In my view this court is seeking by its decisions to establish the principle that a litigant who fails to appear in court in response to a subpoena or other judicial order loses his right to appeal in any civil cases which are then pending. I believe that this rule, if that is the rule which this court seeks to establish, is wrong. In fact precisely the opposite rule applies. In *United States v. Ryan* 402 U.S. 530,532 (1971) the Supreme Court held that in the case of a subpoena served in a criminal case, the party is required to disobey the order of the court in order to preserve his right to appeal. Thus, in my opinion, my

inaction was necessary to preserve certain of my arguments for appeal. I believe that it is also fair to observe that this court has entertained appeals involving Robert Vesco and none has yet argued that because Robert Vesco is disinclined to return from Costa Rica that he has lost his right to appeal.

16. I feel at this point I should state, however, that I did not in my view disobey any valid court order. No judicial subpoena was ever served upon me. It is true that Judge Ward signed an "order" directing me to appear in his court but no attempt was made to effect personal service of this order on me even though I was in Lynchburg, Virginia where I could easily have been served. Moreover, even had personal service been made I was outside of the 100 mile limit for the service of subpoenas and other court process. In short, I do not believe that a judge in a civil case has the power to order me to travel 400 miles to attend his court and I further believe that the only way to test the validity of his order was to fail to attend. In addition, I believe that assuming that a judge does have such power the notice requirement of Fifth Amendment due process mandates that there be personal service in the same manner as an order to show cause, order of civil arrest, or summons and complaint. This point has been briefed in my appeal under docket number 75-6106 and I think it demonstrates that that appeal should be decided before Judge Ward's contempt order can be used as a basis for the dismissal of an unrelated appeal.

17. Judge Wards *interpretation of this court*'s decision leads logically to the result that if I do not furnish my books and records to the S.E.C. I lose my right to appeal and if on the other hand I do not furnish my books and records to the S.E.C. I also lose my right to appeal. In other words, I have no right to appeal regardless of what I do. I believe that this contention is wrong and I believe that the three appeals in question must be reinstated.

WHEREFORE, I respectfully pray that this court grant my motions to reinstate appeals numbered 74-1436, 75-7046 and 75-7056.

s/Samuel H. Sloan

[*Sworn to February 6, 1976*]